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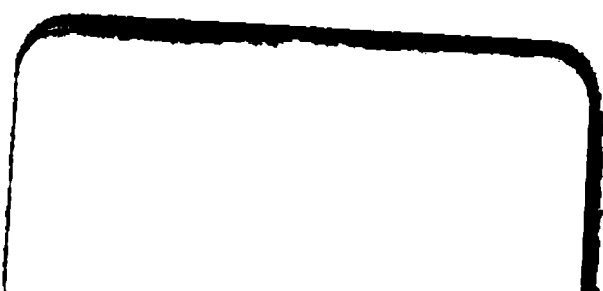
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SELECTED CASES
ON
THE LAW OF
BAILMENTS AND CARRIERS

INCLUDING THE QUASI-BAILMENT RELATIONS OF

CARRIERS OF PASSENGERS
AND
TELEGRAPH AND TELEPHONE
COMPANIES AS CARRIERS

BY

EDWIN C. GODDARD

PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

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PREFACE

In making this volume of "Selected Cases on the Law of Bailments and Carriers," the guiding principle has been to secure the clearest and fullest statement and application of every leading principle of the subject within the range of a moderate sized book.

The important cases, especially on the law of Carriers, are so many as to make it impossible to include all the leading cases. Moreover, the law of Carriers is such a very modern thing as to make it desirable to include many cases too recent to be considered leading cases. Accordingly, an effort has been made to include all the greatest cases, even those of considerable length, and such others as, because of their broad scope, recent date or clear statements of principles, seem to fully cover the subjects of this branch of the law. The Selected Cases are intended to be complete enough to fit the book for use by those who prefer the "case-method" of study exclusively.

A considerable portion of the cases are chosen from those reported in the American Decisions, American Reports or American State Reports, both because these cases are in general well suited to the purpose, and because this plan brings to the attention of the student the exhaustive notes of the editors of those series of cases. To these are added leading Federal and English cases, as well as some others that seem especially desirable.

In general the opinions are presented in full. In some instances, however, portions are omitted, because they have no bearing in bailment law, or contain references to cases printed elsewhere in the volume. Such omissions are always indicated. The cases are not edited, and but few cross-references are made.

Those who wish to find all the material on a given topic can do so by use of the index and of the companion volume, "Outlines of the Law of Bailments and Carriers," which corresponds chapter for chapter to this volume, and contains citations to all the Selected Cases. In this volume no other indication of the subject of any case is given than the general chapter heading. The student will best acquire the power of analysis, and ability to see and grasp the vital points of a case by cultivating independence of extraneous aids. By such a mastery of the cases may be acquired mental power, and that ability to apply abstract principles to concrete cases which is so necessary a part of the equipment of a real lawyer.

EDWIN C. GODDARD.

Ann Arbor, July 1, 1904.

TABLE OF CONTENTS

PART I

OF BAILMENTS IN GENERAL.

CHAPTER I.

OF THE DEFINITION AND CLASSIFICATION OF BAILMENTS.

§§ 1-4. See also § 19.

CHAPTER II.

OF THE LEGAL RESULTS OF THE RELATION IN GENERAL.

§§ 5-17. See also §§ 1, 3, 19, 33, 34, 43, 103, 113, 135.

PART II

OF ORDINARY BAILMENTS.

I. OF GRATUITOUS BAILMENTS.

CHAPTER III.

A. OF GRATUITOUS SERVICES.

§§ 18-20. See also §§ 1, 5, 6, 7, 10, 135.

CHAPTER IV.

B. OF GRATUITOUS LOANS.

See §§ 1, 3, 8, 10, 14, 15.

II. OF MUTUAL BENEFIT BAILMENTS.

CHAPTER V.

CLASSIFICATION AND GENERAL PRINCIPLES.

See §§ 18, 33.

TABLE OF CONTENTS.

CHAPTER VI.

A. PIGNUS, OR PLEDGE.

§§ 21-32. See also §§ 1, 7, 16, 44.

B. LOCATIO, OR HIRING.

CHAPTER VII.

OF LOCATIO REI.

§§ 33-35. See also §§ 11, 12, 14, 47.

CHAPTER VIII.

OF LOCATIO OPERIS.

§§ 36-49. See also §§ 1, 7, 9, 24, 26.

PART III

OF EXTRAORDINARY BAILMENTS.

CHAPTER IX.

OF INNS AND INKEEPERS.

§§ 50-61. See also § 40.

OF COMMON CARRIERS.

CHAPTER X.

OF COMMON CARRIERS OF GOODS.

§§ 62-66. See also §§ 53, 55, 85, 95, 96, 103.

CHAPTER XI.

OF THE RIGHTS AND DUTIES OF THE COMMON CARRIER.

§§ 67-99. See also §§ 1, 35, 46, 49, 62, 66, 100, 106.

CHAPTER XII.

B. LIABILITY OF THE COMMON CARRIER OF GOODS UNDER SPECIAL CONTRACT.

§§ 100-107. See also §§ 62, 66, 79, 92, 93, 97, 114.

CHAPTER XIII.

TERMINATION OF THE CARRIER'S RELATION.

§§ 108-128. See also §§ 46, 49, 68, 77, 78, 80, 81, 88, 97, 107.

PART IV
OF QUASI-BAILEES.

CHAPTER XIV.

OF CARRIERS OF PASSENGERS.

§§ 129-165. See also §§ 53, 54, 65, 93, 100, 102, 108, 119, 125.

CHAPTER XV.

OF CARRIERS OF INTELLIGENCE.

§§ 166-176. See also § 185.

PART V
OF ACTIONS AGAINST CARRIERS.

CHAPTER XVI.

**OF ACTIONS AGAINST COMMON CARRIERS OF GOODS, OF PASSENGERS
AND OF INTELLIGENCE.**

**§§ 177-186. See also §§ 67, 76, 79, 85, 89, 114, 122, 131, 134, 142,
153, 159, 167, 168, 169, 170, 172, 174.**

TABLE OF CASES REPORTED

(The references are to sections.)

Allen v. Delano (55 Me. 113).....	16
Allen v. Maine Central Railroad Co. (79 Me. 327).....	128
Allen v. Sackrider (37 N. Y. 341).....	63
American District Telegraph Co. v. Walker (72 Md. 454).....	47
American Express Co. v. Hockett (30 Ind. 250).....	109
American Pig Iron etc. Co. v. German (126 Ala. 194).....	23
Armory v. Delamirie (1 Strange 505).....	13
Auerbach v. New York Central Railroad Co. (89 N. Y. 281).....	147
Ayer v. Western Union Telegraph Co. (79 Me. 493).....	169
Ayres v. Chicago & Northwestern Railway Co. (71 Wis. 372).....	85
Bennett v. American Express Co. (83 Me. 236).....	92
Bennett v. Byram (38 Miss. 17).....	98
Bennett v. Mellor (5 T. R. 273).....	57
Blum v. Pullman Palace Car Co. (1 Flip. (U. S.) 500).....	54
Boston & Lowell Railroad Co. v. Proctor (1 Allen (Mass.) 267).....	148
Bostwick v. Railroad Co. (45 N. Y. 712).....	101
Bowell v. DeWald (2 Ind. App. 303).....	58
Bretz v. Diehl (117 Pa. St. 589).....	4
Brien v. Bennett (8 Car. & P. 724).....	137
Bricker v. Philadelphia Railroad Co. (132 Pa. St. 1).....	130
Briggs v. Boston & Lowell Railroad Co. (6 Allen (Mass.) 246).....	77
Bullard v. American Express Co. (107 Mich. 695).....	115
Burdiet v. Murray (3 Vt. 302).....	41
Carsten v. Northern Pacific Railroad Co. (44 Minn. 454).....	182
Central Union Telephone Co. v. Falley (118 Ind. 194).....	176
Champion v. Bostwick (18 Wend. (N. Y.) 175).....	123
Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota (134 U. S. 418)	71
Chicago & Northwestern Railway Co. v. Jenkins (103 Ill. 588).....	72
Chicago & Northwestern Railway Co. v. People (56 Ill. 365).....	80
Chicago & Northwestern Railway Co. v. Williams (55 Ill. 185).....	149
Chicago, Rock Island & Pacific Railroad Co. v. Boyce (73 Ill. 510)...	165
Christenson v. American Express Co. (15 Minn. 270).....	66
Christie v. Griggs (2 Camp. 79).....	155
Clafin v. Meyer (75 N. Y. 260).....	9
Clark v. Burns (118 Mass. 275).....	55
Cobb v. Wallace (5 Cold. (Tenn.) 539).....	33

TABLE OF CASES REPORTED.

(The references are to sections.)

Coggs v. Bernard (2 Ld. Ray. 909).....	1
Commonwealth v. Boston & Maine Railroad Co. (129 Mass. 500)....	154
Condon v. Marquette etc. Railroad Co. (55 Mich. 218).....	126
Cook v. Railway Co. (81 Ia. 551).....	74
Cooper v. Young (22 Ga. 269).....	179
Curtis v. Murphy (63 Wis. 4).....	56
Cutler v. Bonney (30 Mich. 259).....	60
Davis v. Garrett (6 Bing. 716).....	35
Doane v. Russell (3 Gray (Mass.) 382).....	45
Dodge v. Boston & Bangor Steamship Co. (148 Mass. 207).....	157
Doorman v. Jenkins (2 Ad. & Ellis 256).....	5
Doyle v. Fitchburg Railroad Co. (162 Mass. 66).....	133
Dyer v. Great Northern Railway Co. (51 Minn. 345).....	122
Emay v. Fanning (9 Barb. (N. Y.) 176).....	17
Evans v. Fitchburg Railroad Co. (111 Mass. 142).....	94
Express Cases, The (117 U. S. 1).....	86
Fay v. Pacific Improvement Co. (93 Cal. 253).....	52
Ferguson v. Anglo-American Telegraph Co. (178 Pa. St. 377).....	184
Filer v. New York Central Railroad Co. (49 N. Y. 47).....	159
Finn v. Western Railroad Corporation (112 Mass. 524).....	177
Fish v. Chapman (2 Ga. 349).....	62
Fisk v. Newton (1 Denio (N. Y.) 45).....	108
Forsee v. Alabama Great Southern Railroad Co. (63 Miss. 66).....	142
Forward v. Pittard (1 T. R. 27).....	88
Foster v. Essex Bank (17 Mass. 479).....	19
Foster v. Metts (55 Miss. 77).....	166
Frederick v. Marquette etc. Railroad Co. (37 Mich. 342).....	145
Friedlander v. Railway Co. (130 U. S. 416).....	84
Galena etc. Railroad Co. v. Rae (18 Ill. 488).....	67
Geilfuss v. Corrigan (95 Wis. 651).....	24
Geismer v. Lake Shore & Michigan Southern Railway Co. (102 N. Y. 563)	99
Gemmell v. Davis (75 Md. 546).....	28
Gibson v. Sturge (10 Exch. 622).....	75
Goldberg v. Ahnapsee & Western Railway Co. (105 Wis. 1).....	162
Gray v. Merriam (148 Ill. 179).....	6
Green v. Boston & Lowell Railroad Co. (128 Mass. 221).....	180
Green v. Hollingsworth (5 Dana (Ky.) 173).....	15
Grinnell v. Cook (3 Hill (N. Y.) 485).....	40
Grinnell v. Western Union Telegraph Co. (113 Mass. 299).....	171
Hale v. New Jersey Steam Navigation Co. (15 Conn. 539).....	64
Hall v. Page (4 Ga. 428).....	22
Hansen v. Flint & Pere Marquette Railroad Co. (73 Wis. 346).....	107
Harkness v. Western Union Telegraph Co. (73 Ia. 190).....	174
Hart v. Chicago etc. Railway Co. (69 Ia. 485).....	87
Hart v. Pennsylvania Railroad Co. (112 U. S. 331).....	105

TABLE OF CASES REPORTED.

xi

(The references are to sections.)

Hasse v. American Express Co. (94 Mich. 133).....	117
Hawkins v. Hoffman (6 Hill (N. Y.) 586).....	119
Hinkle v. Southern Railway Co. (126 N. C. 932).....	97
Hoar v. Maine Central Railroad Co. (70 Me. 65).....	129
Hollister v. Nowlen (19 Wend. (N. Y.) 234).....	100
Houton v. Holliday (2 Murph. (N. C.) 111).....	27
Hufford v. Grand Rapids & Indiana Railroad Co. (64 Mich. 631).....	146
Illinois Central Railroad Co. v. Frankenberg (54 Ill. 88).....	68
Ingalls v. Bills (2 Met. (Mass.) 1).....	152
Jammison v. Chesapeake & Ohio Railway Co. (92 Va. 327).....	156
Judson v. Western Railroad Corporation (4 Allen (Mass.) 520).....	81
Kansas Pacific Railway Co. v. Nichols (9 Kan. 235).....	95
Kent v. Baltimore & Ohio Railroad Co. (45 Ohio St. 284).....	143
Kinsley v. Lake Shore & Michigan Southern Railway Co. (125 Mass. 54)	164
Kisten v. Hildebrand (9 B. Monroe (Ky.) 72).....	50
Knowles v. Railroad (38 Me. 55).....	20
Krause v. Commonwealth (93 Pa. St. 418).....	2
Leach v. French (69 Me. 389).....	11
Leavell v. Western Union Telegraph Co. (116 N. C. 211).....	173
Little v. Fossett (34 Me. 545).....	14
Louisville etc. Railway Co. v. Goodykoontz (119 Ind. 111).....	181
Louisville etc. Railway Co. v. Wilson (119 Ind. 352).....	69
McEntee v. New Jersey Steamboat Co. (45 N. Y. 34).....	120
McMillan v. Railroad Co. (16 Mich. 79).....	114
Magoffin v. Missouri Pacific Railway Co. (102 Mo. 540).....	132
Maryland Insurance Co. v. Dalrymple (25 Md. 242).....	32
Masonic Savings Bank v. Bang's Adm'r (84 Ky. 135).....	26
Meier v. Pennsylvania Railroad Co. (64 Pa. St. 225).....	153
Memphis & Charleston Railroad Co. v. Benson (85 Tenn. 627).....	151
Mentzer v. Western Union Telegraph Co. (93 Ia. 752).....	185
Michigan Southern & N. L. Railroad Co. v. McDonough (21 Mich. 165)	96
Moore v. New York etc. Railroad Co. (173 Mass. 335).....	127
Morganton Mfg. Co. v. Ohio River etc. Railway Co. (121 N. C. 514) ..	83
Morningstar v. Cunningham (110 Ind. 328).....	48
Moses v. Boston & Maine Railroad Co. (32 N. H. 523).....	112
Moulton v. St. Paul etc. Railway Co. (31 Minn. 85).....	106
Mowers v. Fethers (61 N. Y. 34).....	51
Munn v. Illinois (94 U. S. 113).....	70
Murchison v. Sergeant (69 Ga. 206)	61
Mynard v. Syracuse etc. Railroad Co. (71 N. Y. 180).....	104
Nashua Lock Co. v. Worcester & Nashua Railroad Co. (48 N. H. 339)	124
Newhall v. Paige (10 Gray (Mass.) 366).....	18
New Jersey Steam Navigation Co. v. Merchants Bank (6 How. (U. S.) 344)	79
New York Central Railroad Co. v. Fraloff (100 U. S. 24).....	163

(The references are to sections.)

Norton v. Baxter (41 Minn. 146).....	30
Norway Plains Co. v. Boston & Maine Railroad Co. (1 Gray (Mass.) 263)	113
O'Brien v. Boston etc. Railway Co. (15 Gray (Mass.) 20).....	139
Orange County Bank v. Brown (9 Wend. (N. Y.) 85).....	93
O'Rourke v. Citizen's Street Railway Co. (103 Tenn. 124).....	141
Pacific Express Co. v. Shearer (160 Ill. 215).....	118
Pennsylvania Railroad Co. v. Aspell (23 Pa. St. 147).....	158
Pennsylvania Railroad Co. v. Parry (55 N. J. L. 551).....	144
Pennsylvania Railroad Co. v. Stern (119 Pa. St. 24).....	121
Philadelphia & Reading Railroad Co. v. Derby (14 How. (U. S.) 468)	136
Pingree v. Railroad Co. (66 Mich. 143).....	90
Potts v. New York & New England Railroad Co. (131 Mass. 455)...	46
Preston v. Prather (137 U. S. 604).....	7
Pulliam v. Burlingame (81 Mo. 111).....	3
Pullman Palace Car Co. v. Smith (73 Ill. 360).....	53
Quimby v. Vanderbilt (17 N. Y. 306).....	125
Railroad v. Lockwood (17 Wall. (U. S.) 357).....	103
Railroad v. Reeves (10 Wall. (U. S.) 176).....	89
Ranchau v. Rutland Railroad Co. (71 Vt. 142).....	102
Robinson v. Hurley (11 Ia. 410).....	31
Rucker v. Donovan (13 Kan. 251).....	78
Savannah etc. Railway Co. v. Pritchard (77 Ga. 412).....	178
Scheu v. Benedict (116 N. Y. 510).....	110
Schmidt v. Blood (9 Wend. (N. Y.) 268).....	43
Scofield v. Railway (43 Ohio St. 571).....	73
Sears v. Eastern Railroad Co. (14 Allen (Mass.) 433).....	161
Sensenbrenner v. Matthews (48 Wis. 250).....	37
Shaw v. Railroad Co. (101 U. S. 557).....	49
Sibley v. Aldrich (33 N. H. 553).....	59
Sickels v. Pattison (14 Wend. (N. Y.) 257).....	36
Small v. Robinson (69 Me. 425).....	38
Spade v. Lynn & Boston Railroad Co. (168 Mass. 285).....	183
Spooner v. Manchester (133 Mass. 270).....	34
Springer v. Ford (189 Ill. 430).....	160
Standish v. Narragansett Steamship Co. (111 Mass. 512).....	138
Stearns v. Marsh (4 Denio (N. Y.) 227).....	21
Steamboat New World v. King (16 How. (U. S.) 469).....	135
Steinman v. Wilkins (7 Watts & S. (Pa.) 466).....	42
Stiles v. Davis (1 Black (U. S.) 101).....	91
Sweet v. Barney (23 N. Y. 335).....	116
Tate v. Yazoo etc. Railroad Co. (78 Miss. 842).....	82
Telegraph Co. v. Griswold (37 Ohio St. 301).....	167
Thompson-Houston Electric Co. v. Simon (20 Ore. 60).....	65
Thorne v. Deas (4 Johns. (N. Y.) 84).....	10
True v. International Telegraph Co. (60 Me. 9).....	168

TABLE OF CASES REPORTED.**xiii****(The references are to sections.)**

Union Freight Railroad Co. v. Winkley (159 Mass. 133).....	76
Warren v. Fitchburg Railroad Co. (8 Allen (Mass.) 227).....	131
Webbe v. Western Union Telegraph Co. (169 Ill. 610).....	170
Wentworth v. McDuffie (48 N. H. 402).....	12
West v. Western Union Telegraph Co. (39 Kan. 93).....	186
Western Union Telegraph Co. v. Mitchell (91 Tex. 454).....	175
Western Union Telegraph Co. v. VanCleave (107 Ky. 464).....	172
Whitlock v. Heard (13 Ala. 776).....	44
Williams v. Allsup (10 C. B. (N. S.) 417).....	39
Williams v. Oregon Short Line Railroad Co. (18 Utah 210).....	134
Wilson v. Brett (11 Mees. & W. 113).....	8
Wilson v. Little (2 N. Y. 443).....	25
Wright v. Bank of Metropolis (110 N. Y. 237).....	29
Zachery v. Mobile & Ohio Railroad Co. (74 Miss. 520).....	150
Zagelmeyer v. Cincinnati, Saginaw & Mackinaw Railroad Co. (102 Mich. 214)	140
Zinn v. New Jersey Steamboat Co. (49 N. Y. 442).....	111

SELECT CASES
TO ILLUSTRATE THE LAW OF
BAILMENTS AND CARRIERS

PART I
OF BAILMENTS IN GENERAL

CHAPTER I.

OF THE DEFINITION AND CLASSIFICATION OF BAILMENTS.

1. COGGS V. BERNARD,

2 Ld. Raymond 909; 1 Sm. Lead. Cas. 199. 1703.

The facts are stated in the opinion.

HOLT, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the

grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The *first* sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's case. The *second* sort is, when goods or chattels that are useful are lent a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The *third* sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The *fourth* sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English, a pawn or a pledge. The *fifth* sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The *sixth* sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the *first* sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. *He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect.* There is, I confess, a great authority against me; where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him

without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that there never was any such resolution given before Southcote's case. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitzh. Detinue 59, where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods; that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest; for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40. b. was but a debate at bar; for Danby was but a counsel then; though he had been chief justice in the beginning of Edw. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney, for his client, said the contrary. The case in 3 Hen. 7. 4. is but a sudden opinion; and that but by half the court; and yet, that is the only ground for this opinion of my Lord Coke which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and

digested that matter. Though, I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b. '*J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidia vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae facilitati hoc debet imputare.*' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes further; for there it is said: '*Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidia ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit quia qui negligenti amico rem custodiendam tradit, non ei, sed suae facilitati, id imputare debet.*' So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that won't charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrongdoers. 3 Cro. 214, acc., 2 Cro. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrongdoers, when put in writ-

ing, it is hard it should do it more so when spoken. Doct. and Stud. 130 is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrongdoer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the *second* sort of bailment, viz. *commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable: as, if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton *ubi supra*: his words are: '*Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatum domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.*' I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be

chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care: but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the *third* sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b.: '*Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si praestiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberit, nisi talem adhibuerit, de qua superius dictum est.*' From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the *fourth* sort of bailment, viz. *vadium*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them: but then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is, in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the

cow, &c., in recompense for the meat. As to the second point, Bracton, 99. b. gives you the answer:—'*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis [ei] in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit et rem casu amiserit, securus esse possit, nec impediatur creditum petere.*' In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's case. But, indeed, the reason given in Southcote's case, is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them: because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the *fifth* sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a *delivery to one that exercises a public employment, or a delivery to a private person*. First, if it be to a *person of the first sort*, and he is to have a *reward*, he is *bound to answer for the goods at all events*. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of Mors v. Slue, Raym. 220, 1 Vent. 190, 238. The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multi-

tude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account. And the reason of his being a servant, is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust; farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the *sixth* sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3. tit. 27, 684,

defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, '*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis.*' I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretense of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7. 11. a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the *owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6. 49. and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4. 33. this difference is

clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court—what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case, Yelv. 128. But those cases were grumbled at; and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Mors v. Slue, was drawn by the greatest drawer in England in that time; and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

2. KRAUSE V. COMMONWEALTH,

93 Pa. St. 418; 39 Am. R. 762. 1880.

Conviction of larceny. The indictment contained two counts: 1. Larceny; 2. Larceny by bailee. Upon a plea of former acquittal on the first count there was trial and conviction on the second. It appeared that defendant agreed to purchase of one Deemer two horses for \$150, to be paid on delivery. They were delivered, but as defendant had only \$25 they were not paid for, and it was agreed that the defendant should pay the \$25, keep the horses, and have until the following Tuesday to pay the balance or return the horses, the title meantime to remain in Deemer. Krause did not pay on Tuesday. On the following Thursday the horses disappeared, having been sold, or converted by Krause to his own use. Deemer offered to return the \$25 and demanded his horses, but Krause refused to deliver them back.

TRUNKEY, J. (After stating the facts): Having acquitted the defendant of larceny of the horses, the Commonwealth put him to another trial and convicted him of larceny, in stealing the same horses, under section 108 of the Crimes Act of 1860. Villainous as his conduct was, this conviction ought not to stand, unless he was a bailee within the intendment of the act. The word "bailee" is a legal term, to be understood in its generally accepted sense among jurists, and if it be doubtful whether a case be included it shall be excluded, in the construction of a criminal statute. Blackstone defines bailment as "a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee;" Story, "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust;" Jones, "a delivery of goods in trust on a contract, express or implied, that the trust shall be duly executed, and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed or be performed;" and Kent, "a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored to the bailee, as soon as the purpose of the bailment shall be answered." Mr. Edwards, in his work on Bailment, § 2, remarks: These definitions agree in nearly all essential particulars, and disagree in two or three respects. Jones and Kent

assume the property is to be returned, while Blackstone and Story include contracts under which no such return is contemplated. Story intends to include among contracts of bailment a delivery of goods for sale; and Kent intentionally limits his definition so as to exclude that species of contract. "In general terms it may be said that the delivery of goods or any other species of personal estate for use, keeping, or on some other trust, where the general property does not pass, creates a bailment. A delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase-money at a future day, is something more than a bailment; it gives the buyer a conditional title. If the contract give the buyer a definite credit or a reasonable time within which to pay, it gives him a transferable interest in the chattels until the credit expires, and the property in them as soon as he pays the price."

Authors of received authority generally specify five sorts of bailment, namely, *depositum*, *mandatum*, *commodatum*, pledge and hiring; and as severally defined, in each the entire property of the thing bailed remains in the bailor, the possession only is given to the bailee, who is to return or deliver the thing itself as soon as the purpose of the bailment shall be answered. In this State it is settled that the bailee of goods, who uses and enjoys them as if his own, cannot divest the title of the bailor by a sale to an innocent person; nor can a creditor of the bailee seize them in execution of his debt. When delivered under a contract of bailment, the owner will be entitled to them against everybody. But a delivery on a conditional sale, the property to remain in the vendor until the goods are paid for, with right to reclaim them, is void as respects the vendee's creditors, or an innocent purchaser from him. The delivery being on the foot of a purchase, the vendor's right, as against the vendee's creditors, is regarded as a lien for the purchase-money. *Chamberlain v. Smith*, 44 Penn. St. 431; *Haak v. Linderman*, 64 Penn. St. 499; 3 Am. Rep. 612. By the terms of the contract the seller may retain the right of property in the goods till paid for, as against the purchaser, and in default of payment, he may reclaim them, or use civil remedies for recovery of possession; but the contract does not make him a bailor, as respects other persons, nor the purchaser a bailee in the sense of the word as used in the statute.

Our statute, as shown by READ, J., in *Commonwealth v.*

Chatham, 50 Penn. St. 181, is taken from the English statute; and in that case the interpretation of the words "bailee" and "bailment," as fixed by the English decisions, was adopted, which decisions were cited, showing that the words must be interpreted according to their ordinary legal acceptance, that "bailment relates to something in the hands of the bailee, which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under any obligation to return it in precisely the identical coins which he originally received;" that "to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved: First: That there was such a delivery of the property as to divest the owner of the possession, and vest it in the prisoner for some time; Secondly. That at the expiration or determination of that time the same identical property was to be restored to the owner."

The term "bailee" is one to be used, not in its large but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods *bona fide*, and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statutes is not constituted. Whart. Crim. Law, § 1855 (8th ed).

The bargain was struck for a sale of the horses for \$150, payable on delivery. At the time stipulated Deemer delivered the horses, Krause paid \$25, they agreed that the property should continue in Deemer, and on the next Tuesday Krause would pay the balance or return the horses. He refused to do either. The original contract was not changed—time was extended to Krause to enable him to pay the money. If there was a delivery at all, it was on the footing of the sale. There was no agreement to sell at a future time—a mere contract that the buyer would pay the balance of the price or return the property, in the meantime the title to be in the seller. Payment would have been a complete performance. Krause was not bound to return the identical property. He had a transferable interest until the credit expired, and he or his transferee would have had clear title the instant of payment. This was something more than a bailment, and Krause was not a bailee in the statutory sense.

In favor of the liberty of the citizen, the court may, and in a

proper case should, declare the evidence insufficient to convict. *Pauli v. Commonwealth*, 89 Penn. St. 432. We are of opinion that the defendant's first point should have been affirmed.

Judgment reversed, and the record, with this opinion setting forth the causes of reversal, is remanded to the Court of Quarter Sessions of Lehigh county for further proceeding.

Judgment accordingly.

3. PULLIAM V. BURLINGAME,

81 Mo. 111; 51 Am. R. 229. 1883.

MARTIN, C. The plaintiff brought an action of replevin in the Circuit Court for the recovery of two mules, alleging that he was "the owner of, and entitled to the immediate possession of" the same. The defendant in answer made a general denial of the facts alleged in the petition. The case was tried by the court, a jury being waived by the parties.

Plaintiff offered testimony tending to prove that he was the owner and in possession of the mules in controversy; that about the month of February, 1880, defendant borrowed said mules from plaintiff, but said nothing then about his wife's interest in or claim to same. That defendant held said mules, until they were taken out of his possession under the writ in this cause.

The defendant then offered, and the court heard testimony tending to show that Martha E. Burlingame was the sister of plaintiff, and wife of defendant; that she owned jointly with plaintiff an undivided half interest in said mules at the time they were borrowed by her husband, and also at the time they were taken from defendant under the writ aforesaid. Defendant also introduced evidence showing that he was in possession of said mules at the time they were replevied in this cause, as the agent of his wife; that he was simply holding the same with and for his wife, by reason of her half interest aforesaid. This was all the testimony offered.

The court, at the instance of plaintiff, declared the law as follows:

"If the court, sitting as a jury, believe from the evidence that the defendant borrowed the mules from the plaintiff and refused to return them to him when so requested, the court will find the right of possession in the plaintiff."

The defendant requested the court, which the latter refused to do, to declare the law as follows:

“If the court, sitting as a jury, believe from the evidence that at the time of the service of the writ herein, said defendant was the husband of one Martha E. Burlingame; that said Martha E. Burlingame was, at said date, the joint owner, with plaintiff, of the mules in controversy, and that said defendant was in possession of, and holding the same with and for his wife, then the court should find the issue for defendant.”

The court found the issues for the plaintiff, and rendered its judgment in due form accordingly.

[Omitting minor point.]

The next inquiry is, whether the defendant could make this defense of paramount title in his wife, in face of the contract of bailment by which he acquired possession of the mules.

The admitted evidence in the case is, that he borrowed them from the plaintiff, and that at the time he so borrowed and received them, he made no mention of any claim in favor of himself or his wife. I have examined this question with a scrutiny which has not been confined to the briefs of counsel, and I am unable to reach any other conclusion than that the defendant is estopped from making the defense by reason of the contract under which he acquired possession of the property in dispute from the plaintiff. In borrowing the mules he became a bailee of them like any other borrower. There being no time fixed for a termination of the bailment, that time could be indicated at any moment by the bailor. It was determinable at his option, and when so terminated, it was the duty of the bailee to return the property bailed to the bailor. The contract of bailment necessarily admits the right of property in the bailor, and the obligation to return it to him at the termination of the term of bailment. In other words, a bailee, when he receives the property by virtue of the bailment, legally admits the right of the bailor to make the contract of bailment. After this subservient relation of the defendant to the plaintiff in respect to the property was established, the law forbids him to dispute the title of plaintiff. The relation is analogous to that which exists between landlord and tenant, a relation which prevents the tenant from setting up against his landlord, either an outstanding or self-acquired adverse title; and from attorning to a stranger without the consent of his landlord, or in pursuance of a judgment

or sale under execution or deed of trust, or forfeiture under mortgage. *Stagg v. Eureka Tanning, etc., Co.*, 56 Mo. 317; R. S. 1879, § 3080; *McCartney v. Auer*, 50 Mo. 395. This rule does not prevent the tenant from showing that the landlord has parted with his title, for such fact would not be inconsistent with the title admitted by the demise. *Higgins v. Turner*, 61 Mo. 249.

In pursuing the analogy of these principles in the law of real estate, Mr. Edwards, in his work on Bailment, says: "The law always aids the true owner to recover his property; and it is a general rule that the bailee cannot dispute the title of his bailor. When therefore the bailee is applied to for the property by a third party claiming title, his prudent course is, to leave the claimant to his action, and at once notify his bailor of the suit; he is not obliged to bear the burden of a litigation; and it is not safe for him to surrender the property on demand. For nothing will excuse a bailee from the duty to restore the property to his bailor, except he show that it was taken from him by due process of law, or by a person having the paramount title, or that the title of his bailor has terminated." *Edwards Bailments* (2d Ed.), § 73; *Welles v. Thornton*, 45 Barb. 390; *Bates v. Stanton*, 1 Duer 79; *Blivin v. R. Co.*, 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Aubery v. Fiske*, 36 N. Y. 47; *McKay v. Draper*, 27 N. Y. 256; *Sinclair v. Murphy*, 14 Mich. 392; *Osgood v. Nichols*, 5 Gray, 420; *The Idaho*, 93 U. S. 575.

Mr. Bigelow, in his work on Estoppel, says: "The relation between bailor and bailee is analogous to that of landlord and tenant. Until something equivalent to title paramount has been asserted against a bailee, he will be estopped to deny the title of his bailor to the goods intrusted to him." *Bigelow Estoppel* (3d ed.), 430. The principle upon which he can relieve himself from the obligation to return the goods is ably discussed by Justice Strong in the "Idaho" case, 93 U. S. 575, wherein he announces the doctrine, that an actual delivery of the goods by the bailee to the true owner, upon his demand for them, will constitute a valid defense against the claim of the bailor. The same principle was applied by this court in the case of *Matheny v. Mason*, 73 Mo. 677; 39 Am. Rep. 541, which was a suit between vendor and vendee for the consideration money of the goods sold. The subject was ably and elaborately consid-

ered by Judge RAY, who rendered the opinion of the court. The vendor was suing for the price of corn sold, with implied warranty of title, and the vendee, in his answer, after admitting the sale and consideration price, pleaded that at the time of the sale he supposed the vendor was the owner of the corn; that after the sale and delivery, he learned that it belonged to a third party, named in the plea; that said third party demanded of him payment for the same, and threatened suit if he refused; that thereupon he paid the full value thereof to said claimant, who was the true owner. It was also added, that the vendor was insolvent. This plea was held sufficient to rebut and overthrow the estoppel imposed on a vendee from denying the title of his vendor when called upon for the purchase-money. In the opinion significance was given to the facts, that the paramount title came first to the knowledge of the vendee after the sale; that said title was asserted by threats of suit; and that the money was actually paid over to the claimant before suit by the vendor. Now, if it requires such a defense to relieve the estoppel imposed upon a vendee, *a fortiori* the same, or an equivalent, will be necessary in the case of a bailee. It has long been settled in this State that the relation of a vendor and vendee, as to real estate, is antagonistic, and that the vendee is not estopped from setting up an outstanding or after-acquired title. *Wilcoxon v. Osborn*, 77 Mo. 621. The estoppel between them is recognized only in respect to the purchase-money. In a suit for it, the vendee is estopped from pleading want of title in the vendor, as long as he retains possession of the land. *Mitchell v. McMullen*, 59 Mo. 252; *Harvey v. Morris*, 63 Mo. 475; *Wheeler v. Standley*, 50 Mo. 509.

The relation of bailor and bailee is not antagonistic in any respect, or at any time. By accepting the property he not only admits the bailor's title, but he assumes, with respect to the thing bailed, a position of trust and confidence, which continues till it is returned or lawfully accounted for. Measured by these principles, the defendant's evidence must fail to excuse him from the obligation to return the borrowed property found in his possession at the time of the replevin. It does not appear that his wife, as paramount claimant, ever asserted any title to this property. Consequently his plea that he holds it as agent for his wife, implies that this is his voluntary act, and was not forced upon him by the assertion in any form of her

pretended title. It will not do for a bailee to hunt up a paramount claimant, and then when called upon by the bailor for the property, answer that he is now the voluntary bailee of such claimant. It must be apparent that this would enable him to enjoy the property by pretending to hold it for another. Justice STRONG in the "Idaho" case remarks, "a bailee cannot avail himself of the title of a third person (though the person be the true owner) for the purpose of keeping the property for himself, not in any case where he has not yielded to the paramount title." 93 U. S. 575.

The evidence in this case shows that the defendant, at the time of the replevin, was in actual possession of the mules which he borrowed, and that his plea of being the agent or bailee of a paramount owner rests upon his voluntary act alone, without suit, threat or demand of such owner or claimant.

Although the cases in which the doctrine of *jus tertii* is defined and enforced are somewhat conflicting, I am not aware of any well-considered expression which goes to the length of justifying the defense, as it appears in the evidence and instructions of this case.

Accordingly I am of the opinion that the court did not err in refusing it, or in giving the one asked by plaintiff. The judgment should be affirmed, and it is so ordered.

Judgment affirmed.

All concur.

4. BRETZ V. DIEHL,

117 Pa. St. 589; 2 Am. St. R. 706. 1888.

Feigned issue under sheriff's interpleader act to determine ownership of flour and bran. The opinion states the facts.

By Court, CLARK, J. The defendants in this case are judgment creditors of William D. Newman, a miller, operating a steam flouring mill in the town of Bedford. Having issued executions, they levied on some eighty or ninety barrels of flour, and some bran found on the floor of Newman's mill. The plaintiffs claimed the property levied upon, alleging that it was the product of grain by them delivered to and held by Newman as their bailee. This is a feigned issue, framed under the sheriff's interpleader act, to determine the dispute.

The plaintiffs, who are farmers residing in the vicinity of Bed-

ford, brought their grain to this mill; no special contract or arrangement was made with the miller by any of the plaintiffs when they delivered their wheat, but, in accordance with the practice of the mill in all cases, except when wheat was at once paid for, a receipt or memorandum was given in the following form:—

CRYSTAL MILLS, BEDFORD, PA., Sept. 12, 1884.

Received from D. W. Lee:—

	Amount.
Four hundred and fifty-five 14-60 b. wheat.....	\$455.14
“ rye,	
“ corn,	
Two hundred and fifty-five 12-32 “ oats.....	255.12
“ buckwheat.	

For use of self.

W. D. NEWMAN.

The mill was not arranged to keep the several lots of grain in separate parcels. It was so constructed that all the grain delivered into it was hoisted to the second floor, emptied into a sink on the first floor, and from thence carried by elevators into a bin on the third floor, where, at times, there was a large accumulated mass of wheat. Newman also purchased wheat in considerable quantities from time to time, which was delivered into the mill, and disposed of as the other wheat. This promiscuous commingling of the grain into a common mass was in accordance with the known usage of the mill, which was supplied for grinding from the mass of the wheat, without any discrimination as to the several lots or parcels in which it was received. The miller, was, of course, under no obligation to restore to the plaintiffs the specific or identical wheat which he received, nor the product of it in flour; indeed, this, owing to the manner in which the business was conducted, was practically impossible.

The fundamental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner; whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case the title is not changed, in the other it is, the parties standing in the relation of debtor and creditor. Thus in *Norton v. Woodruff*, 2 N. Y. 153, a miller agreed to take certain wheat, and to give one barrel of superfine flour for every 4 36-60 bushels thereof, the flour to be delivered

at a fixed time, or as much sooner as he could make it. As the miller's contract was satisfied by a delivery of flour from any wheat, the transaction was held to be a sale. But in *Mallroy v. Willis*, 4 Id. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every 4 15-60 bushels of wheat; this transaction was by the same court held to be a bailment.

If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it; where, however, the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole can, of course, have no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product: *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623; *Hutchison v. Commonwealth*, 82 Pa. St. 472. It makes no difference that the bailee had, in like manner, contributed to the mass of his own wheat; for although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment, which will subject him not only to a civil suit, but also to a criminal prosecution: *Hutchison v. Commonwealth*, *supra*.

But where, as in *Chase v. Washburn*, *supra*, the understanding of the parties was that the person receiving the grain might take from it or from the flour at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment. To the same effect are *Schindler v. Westover*, 99 Ind. 395; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Id. 556; and *Johnston v. Browne*, 37 Iowa, 200. In *Lyon v. Lenon*, 106 Ind. 567, the distinction is thus stated: "If the dealer has the right, at his pleasure, either to ship and sell the

same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrender to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property, as stipulated. The distinction is: Can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." This distinction is drawn, of course, with reference to cases where grain is deposited in a mass, as in grain elevators, etc.

There are cases in which the doctrine of bailment has been carried much beyond the rule recognized in the cases we have cited: See *Sexton v. Graham*, 53 Iowa, 181; 4 N. W. R. 1090, and *Nelson v. Brown*, 53 Id. 555, 5 N. W. R. 719. We think, however, the rule recognized in *Chase v. Washburn*, *supra*, and *Lyon v. Lenon*, *supra*, is a safe one, and is more in accord with the well-settled principles of the law relating to bailment.

But in the case at bar, we are not called upon to say what would be the effect upon the transaction if Newman had authority, in the regular course of dealing, to ship or sell the wheat of his customers on his own account. Undoubtedly he had a right to sell of the grain or flour to the extent of his own share; that is to say, what he contributed to the common stock and the tolls to which he was entitled. But the jury has found that he had no authority whatever to sell or to abstract from the common stock beyond the amount to which he was himself entitled. In the general charge, and also in the answers to the points submitted, the learned court instructed the jurors in the clearest manner that if they should find from the evidence that Newman, by the nature of his dealings with the several plaintiffs, had acquired such dominion over their wheat as authorized him, at his pleasure, not only to grind it into flour, but also to sell the same for his own use, the transaction must necessarily be treated as a sale, and that, in that event, the plaintiffs could not recover. This instruction was repeated with marked emphasis several times during the progress of the charge, and it

seems quite impossible that the jury could have labored under any misapprehension as to the nature of the inquiry they were to make. The verdict of the jury was for the plaintiffs; and we must assume the facts which it is plain the jury, in arriving at such a verdict, must have found, viz., that Newman had no authority to sell the grain delivered into his mill under the arrangement with the plaintiffs,—that is to say, their share of the common stock, nor the flour which was the product thereof. It was the plain duty of Newman, however, to see to it that at all times the mill contained wheat or flour sufficient in amount to answer all demands under the bailment; failing in this, he was derelict in duty, and liable, under the law, for the appropriation and conversion unto his own use of property which did not belong to him.

Nor do we see that the court committed any error in the answers to the plaintiffs' points. These points, according to the general practice, were based upon an assumption of facts, the truth or falsity of which was for the jury, and the law was stated as upon a finding of these facts by the jury. They were relevant to the issue; they disclosed clearly the specific facts assumed, which were fairly and reasonably consistent with the plaintiffs' theory of the case upon the evidence, and the opinion of the court thereon could not have had any weight with the jurors in their deliberations, unless the facts assumed were, in their judgment, established by the proofs. The points certainly were not such as could be disregarded by the court, and we cannot see how the answers thereto could be supposed to have misled the jury.

The learned court defined a bailment and a sale, marking the distinguishing features of each, and as the nature of the transaction depended not wholly upon the written receipt, but in part on verbal evidence as to the method of conducting the business, the question was undoubtedly one proper to be submitted to the jury. The court instructed the jury that if certain facts existed, the transaction was a sale; otherwise it was but a bailment; and the question was proper for the jury whether or not, under the instruction of the court, according to the facts as the jury might find them, the transaction was a bailment or a sale.

On a careful review of the whole case, we find no error, and the judgment is affirmed.

CHAPTER II.

OF THE LEGAL RESULTS OF THE RELATION IN GENERAL.

5. DOORMAN V. JENKINS,

2 Ad. & Ellis 256; 29 E. C. L. 80. 1834.

Assumpsit. On the trial before Denman, C. J., at the London sittings in December, 1833, the plaintiff proved the delivery of the money to the defendant for the purpose of the bill being taken up as alleged in the declaration. The defendant was the proprietor of a coffee-house, and the account which he was proved to have given of the loss was as follows:—That he unfortunately placed the money in his cash-box, which was kept in the tap-room; that the tap-room had a bar in it; that it was open on a Sunday, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on Sunday; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a Sunday. The defendant did not pay the bill when presented. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant, being a gratuitous bailee, was liable only for gross negligence; and the loss of his own money, at the same time as the plaintiff's, shewed that the loss had not happened for want of such care as he would take of his own property. The Lord Chief Justice refused to nonsuit the plaintiff, but took a note of the objection. The defendant called no witnesses. His Lordship told the jury that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence: but his Lordship then said that the evidence of gross negligence was not, in his opinion, satisfactory. Verdict for the plaintiff. In Hilary term last, Sir James Scarlett obtained a rule to shew cause

why the verdict should not be set aside, and a nonsuit be entered, or a new trial be had.

TAUNTON J. I have felt some doubt in this case; but, after the best consideration I can give it, I think the rule ought not to be made absolute. The counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable, except in the case of gross negligence. The sole question, therefore, is, whether there was any proof of such negligence. If there was, the application for a nonsuit, at any rate, cannot be granted; and it is almost (though not quite) equally clear that the defendant must be bound by the decision to which the jury has come. A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly, and alleges that, from his failure so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the Court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury. Without, therefore, laying down any abstract rule, we may, I think, with perfect safety say that, in the present case, the question was entirely for the jury. It is fact, not law. The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public-house

We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a *prima facie* case of gross negligence, which required an answer on the defendant's part. The phrase "gross negligence" means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. The case of *Shiells v. Blackburne*, 1 H. Bl. 158, created at first some degree of doubt in our minds. It was said that the Court, in that case, treated the matter as a question of law, and set aside the verdict, because the thing charged, the false description of the leather in the entry, did not amount to gross negligence; and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found, that in fact the defendant had been guilty of negligence; but the Court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report, how the case was treated at the trial, nor what the Judge said in summing up. But I do not find it laid down, as a rule, that in every case the question of negligence is to be matter of law. The ordinary practice is, to leave it to the jury, whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTESON J. It is agreed on all hands that the defendant is not liable, unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the Court. If the Court is to decide it, and no evidence has been given that satisfies the Court, there ought to have been a nonsuit. If the jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the *onus probandi* was on the plaintiff. It appeared, by the evidence of what the defendant has said, that the money committed to his charge was laid in a box in

the tap room, which room was open on a Sunday, though the rest of the premises were not. Under these circumstances, there can be no nonsuit; for there was a sufficient case to go to the jury. Whether, in the abstract, the question of negligence be for the jury or the Court, I think it unnecessary, as my brother Taunton says, to determine. The present, at all events, was a question of fact, and therefore for the jury. The general question I approach with much diffidence. I do not know any thing more difficult, than to say, in mixed questions of law and fact, what is for the Court, and what for the jury. In the present case, the principal doubt in my mind arose from the case of *Shiells v. Blackburne*, 1 H. Bl. 158. The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some dressed leather, entered it at the Custom House, together with some dressed leather of his own, as wrought leather, in consequence of which the whole was seized. Whether that amounted to gross negligence, must have been a question for the jury. The report does not say how they were directed, nor whether the Judge told them that, in his opinion, it was gross negligence. At first, I conceived that nothing appeared from the report, except that the Court thought it was a case of gross negligence. But, on looking into the case, I find the Court thought that the jury had found the fact erroneously, and sent the issue to another jury. So that, in the present case, the only remaining question is, whether the Judge left the question properly. At first, I understood that the question left had been, whether the defendant had used ordinary and reasonable care, which, although it may be a useful criterion in determining the question whether there has been gross negligence, is certainly not the same question. But it seems that his lordship left it to them to say, whether there had been gross negligence; and that what he said respecting ordinary care, was merely by way of illustration. We cannot, therefore, disturb the verdict. Whether I should have found the same verdict, is quite immaterial.

LORD DENMAN C. J. It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a judge to take upon himself to say whether negligence is gross or not. I agree to all the legal doctrine in *Shiells v. Blackburne*, 1 H. Bl. 158, which is,

merely, that a bailee without reward is not liable to an action without proof of gross negligence. I do not find a word there to the effect that the judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which the jury did of this case, and I pressed, as strongly as possible, my opinion upon them. Whether, if I had heard all they said to each other, and had possessed all their experience, I should have changed my opinion, I cannot say; but certainly the question was for them. Williams, J. also rendered a concurring opinion. Rule discharged.

6. GRAY V. MERRIAM.

148 Ill. 179; 35 N. E. R. 810; 39 Am. St. R. 172. 1893.

Action by Merriam for the value of fifteen bonds left with defendant bankers for safe keeping. The facts are stated in the opinion.

MAGRUDER, J. The main error assigned is the giving of the first instruction given by the trial court for the plaintiff. It is claimed by plaintiff in error that the defendant bankers were gratuitous bailees, holding the bonds in controversy as a special deposit for safekeeping without reward. The general rule is, that a gratuitous bailee is liable only for gross negligence: Story on Bailments, 9th ed., secs. 62, 79; Schouler on Bailments and Carriers, 2d ed., sec. 35; Skelley v. Kahn, 17 Ill. 170. The instructions for both plaintiff and defendants require the jury to find that the defendants were guilty of gross negligence in the keeping of the bonds as a condition to the right of recovery. But the objection made to plaintiff's instruction is the definition which it gives of gross negligence in the use of the following clause: "The want of ordinary and reasonable care is in law termed gross negligence." Gross negligence has been defined to be the absence or want of slight care or diligence: Story on Bailments, secs. 62, 64; Schouler on Bailments and Carriers, secs. 15, 35; Michigan Cent. R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248; Chicago etc. R. R. Co. v. Johnson, 103 Ill. 512. But the portions of the instruction which precede and follow said clause are in harmony with much of the language used in the text-books and decisions. Schouler, in his recent

work on Bailments and Carriers, section 35, after announcing that the gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or injury, unless grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. . . . 'Slight,' 'ordinary,' and 'great' are terms they (some courts) wish to see discarded, and they prefer judging of each case by its own complexion." The same author states that in the main gross negligence is a question of fact upon all the evidence for the jury, and that what constitutes slight diligence or gross negligence will depend in each case upon a variety of circumstances, such as the occupation, habits, skill, and general character of the bailee, and local custom and business usage: Schouler on Bailments and Carriers, secs. 49, 50. Story, after stating the rule that when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that, in every case, good faith requires a bailee, without reward, to take reasonable care of the deposit; "and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties": Story on Bailments, secs. 23, 62.

In *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59, which was an action against a bank for the conversion or loss, by gross negligence, of valuable articles deposited with it as a bailee without hire, the court said: "This was a gratuitous bailment. The defendants are liable only for want of ordinary care."

A deposit is a naked bailment of goods to be kept for the bailor without recompense, and to be returned when the bailor shall require it, while a mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them: Story on Bailments, secs. 4, 5. But a mandatary, like a depositary, is said to be bound only to slight diligence, and responsible only for gross neglect: Story on Bailments, sec. 174. In *Skelley v. Kahn*, 17 Ill. 170, we held that "a mandatary or bailee who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common sense

and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care.”

The liability of banks, acting as bailees, without reward, in the care of special deposits, has been recently considered in the case of *Preston v. Prather*, 137 U. S. 604; 11 Sup. Ct. R. 162; and it was there held that such bailees are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; that the exercise of reasonable care is in all such cases the dictate of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. Gross negligence, as applied to gratuitous bailees, is defined in that case to be “nothing more than a failure to bestow the care which the property in its situation demands”; and the court further says: “The omission of the reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine.”

In the light of these more liberal views as to the liabilities of bailees without reward, we think that the clause in question, when considered in connection with the rest of the instruction, could only have been understood by the jury as referring to the want of such ordinary and reasonable care as was designated in the previous part of the instruction, that is to say, the care usually and generally deemed necessary in the community for the security of similar property under like circumstances. The rule, that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive, cannot be applied to all cases of bailment without reward. When securities are deposited with banks accustomed to receive such deposits, they are liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in keeping property of such value: *Bank v. Zent*, 39 Ohio St. 105; 16 Am. & Eng. Ency. of Law, 160, 206.

But if it be conceded that the definition of gross negligence in the clause above quoted, even when considered in connection with the balance of the instruction, is technically inaccurate, it does not follow that plaintiff in error is entitled to a reversal of the judgment in this case. A judgment will not be

reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court: *Hall v. Sroufe*, 52 Ill. 421; *Burling v. Illinois Cent. R. R. Co.*, 85 Ill. 18; *Hubner v. Feige*, 90 Ill. 208; *Chicago etc. R. R. Co. v. Warner*, 108 Ill. 538; *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; 5 N. E. R. 92; *Town of Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. R. 422.

The defendants in this case did a regular banking business. The plaintiff kept a deposit and check account with them. He borrowed money from them from time to time, and authorized them to hold the bonds in question as collaterals to secure the notes given for such loans. While the bonds were thus held as collaterals, the character of the bailment was changed from a bailment for the exclusive benefit of the bailor to one for the mutual benefit of the bailor and bailee: *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. R. 162. In ordinary cases of special deposits without reward the banker has no right to handle or examine the property except so far as its safety may require. But here the bankers had access to the package containing the bonds, and detached the interest coupons when they fell due, and collected the interest, and deposited it to the credit of the plaintiff, to be checked out by him in the regular course of business: *National Bank v. Graham*, 100 U. S. 699; *Whitney v. First Nat. Bank*, 55 Vt. 154; 45 Am. Rep. 598.

Ker, the assistant cashier of the bank, stole the bonds in the summer of 1882. He had access to these bonds and to the other special deposits kept by the bank in its vault. About a year before he absconded, Kean, the chief officer of the bank, had his attention called to the fact that Ker was speculating upon the board of trade in Chicago, and had a conversation upon the subject with him. Ker was not known to have any other property than his salary of eighteen hundred dollars. He was, however, allowed to retain his position in the bank, and no effort was made to verify the truth of the statements made as to his speculations, and no examination was made to ascertain whether he was using moneys which did not belong to him. About two

months before he absconded, the subject of his speculations was again called to the attention of the chief officers of the bank through an anonymous communication, and Kean had a second interview with him in relation to his conduct in this regard. "The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed": *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. R. 162. The facts thus detailed are undisputed, and are established by the evidence of the defendants themselves.

In *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, an action was brought in the circuit court of the United States by parties in Missouri, doing business under the firm name of the Nodaway Valley Bank of Maryville, against the same bankers who are defendants in the present suit, to recover the value of United States bonds held as a special deposit, and stolen by the said Ker about the same time when he appropriated the bonds in controversy here. The *Prather* case was tried by agreement before the federal circuit judge without a jury, resulting in judgment for the plaintiffs, and was taken afterwards to the supreme court of the United States, where the judgment rendered by the circuit judge was affirmed. The evidence in that case established substantially the same facts as are herein set forth. Those facts, which are here undisputed and supported by the testimony of the defendants, were there held by the federal supreme court to constitute such gross negligence as to make the defendants liable for the loss of the bonds. (Omitting a quotation from the opinion of the court in the *Prather* case).

Inasmuch as the undisputed facts presented to the jury for their consideration on the trial below have been determined by the supreme court of the United States to amount to such gross negligence as will fasten liability upon a gratuitous bailee, we are disposed to hold that the verdict of the jury was right, independently of the error in the instruction, and that it ought not to be disturbed: *Scott v. National Bank*, 72 Pa. St. 471; 13 Am. Rep. 711.

It is said that the trial court erred in admitting testimony showing that the bonds had been pledged as collateral security for loans made by the bank to the plaintiff at various times before they were stolen, and that the evidence should have been confined to the character of the bailment at the time of the loss in the summer or fall of 1882, as at the latter date all prev-

§§ 6, 7 LEGAL RESULTS OF BAILMENT RELATION.

ious loans, for the security of which the bonds had been pledged, had been paid up, and they were then held merely as a special deposit. We think that this testimony, as well as that showing that Ker had access to the bonds for the purpose of cutting the quarterly coupons therefrom, as late as October, 1882, after some of them had been abstracted, was competent to show the relation of the parties to each other and to the property. As the reasonable care which the defendants were required to take of the bonds depended upon the situation and the bearing of surrounding circumstances, and the nature of the custody which they were allowed to exercise over the bonds, the extent to which they were permitted to have access to the bonds, under instructions by correspondence from the plaintiff, who lived in Iowa, either for the purpose of holding them as collaterals to notes, or for the purpose of detaching the coupons, had a direct bearing upon the question of their obligation to make examination when advised of the speculations of their assistant cashier.

The judgment of the appellate court is affirmed.

Judgment affirmed.

7. PRESTON V. PRATHER,

137 U. S. 604; 11 S. Ct. R. 162. 1890.

Action for the value of certain U. S. bonds of about \$12,000 face value, purchased for plaintiff by defendants and kept as a special deposit under a special agreement. The bonds were stolen by defendants' assistant cashier. Judgment for plaintiffs.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

By the defendants it was contended below in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence, and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were

deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protection of property placed in their custody; and further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties.

Much of the argument of counsel before the court, and in the briefs filed before them, was unnecessary—indeed, was not open to consideration—from the fact that the case was heard, upon stipulation of parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact. There is in the record no bill of exceptions taken to ruling in the progress of the trial, and the correctness of the findings upon the evidence is not open to our consideration. Rev. Stat. § 700. The question whether the facts found are sufficient to support the judgment is the only one of inquiry here.

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omis-

sion of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *Steamboat New World v. King*, 16 How. 469, 474, 475; *Railroad Co. v. Lockwood*, 17 Wall. 357, 383; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489, 494. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employees and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment.

Thus, in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. D. 168, the bank was, in such a case, exonerated from liability for the property entrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachusetts holding that he had acted without the scope of his authority, and, therefore, the bank was not liable for his acts any more than it would have been for the acts of a mere stranger. In that case a chest containing a quantity of gold coin, which was specified in an accompanying memorandum, was deposited in the bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank and used. It was held, upon the doctrine stated, that the bank was not liable to the depositor for the value of the gold taken.

In the subsequent case of *Smith v. First National Bank in Westfield*, 99 Mass. 605, 611, 97 Am. D. 59, the same court held that the gross carelessness which would charge a gratuitous bailee for the loss of property must be such as would affect its safe-keeping, or tend to its loss, implying that liability would attach to the bailee in such cases. and to that extent qualifying the previous decision.

In *Scott v. National Bank of Chester Valley*, 72 Penn. St. 471, 480, 13 Am. R. 711, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depositary, without special contract or reward, was not liable for the loss of a government bond deposited with it for safe-keeping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it

was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that:

“No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed.”

As stated above, the reasonable care which persons should take of property entrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stock of their assistant cashier who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court

to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was some one in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defendants, residing at Detroit, received an anonymous communication, stating that some one connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employees, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed. Upon this subject the court below, in giving its decision, *Prather v. Kean*, 29 Fed. Rep. 498, after observing that the defendants knew that Ker had been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous speculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was

gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs, subsequent to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as securities for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence.

Two cases cited by counsel, one from the Court of Appeals of Maryland and the other from the Court of Appeals of New York, declare and illustrate the relation of parties under conditions similar to those of the parties before us.

§§ 7, 8 LEGAL RESULTS OF BAILMENT RELATION.

(Omitting a discussion of *Third National Bank v. Boyd*, 44 Maryland, 47, and of *Cutting v. Marlor*, 78 N. Y. 454.)

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen.

Judgment affirmed.

8. WILSON V. BRETT,

11 Mees. and Welsby 113. 1843.

CASE.—Plea, not guilty.

At the trial before Rolfe, B., at the London Sittings in this term, it appeared that the plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others in playing the game of cricket: and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned Judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages, 5£. 10s.

Byles, Serjt., now moved for a new trial, on the ground of misdirection.—There was no evidence here that the horse was ridden in an unreasonable or improper manner, except as to the place where he was ridden. The defendant was admitted

to be a mere gratuitous bailee: and there being no evidence of gross or culpable negligence, the learned Judge misdirected the jury, in stating to them that there was no difference between his responsibility and that of a borrower. There are three classes of bailments; the first, where the bailment is altogether for the benefit of the bailor, as where goods are delivered for deposit or carriage; the second, where it is altogether for the benefit of the bailee, as in the case of a borrower; and the third, where it is partly for the benefit of each, as in the case of a hiring or pledging. This defendant was not within the rule of law applicable to the second of these classes. The law presumes that a person who hires or borrows a chattel is possessed of competent skill in the management of it, and holds him liable accordingly. The learned Judge should therefore have explained to the jury, that that which would amount to proof of negligence in a borrower, would not be sufficient to charge the defendant, and that he could be liable only for gross and culpable negligence.

PARKE, B.—I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ROLFE, B.—The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence*—that it was the same thing, with the addition of a vitu-

§§ 8, 9 LEGAL RESULTS OF BAILMENT RELATION.

perative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence.

Lord Abinger, C. B., and Alderson, B., concurred.

Rule refused.

9. CLAFLIN V. MEYER,

75 N. Y. 260; 31 Am. R. 467. 1878.

Action against warehouseman for failure to deliver goods. Judgment for plaintiff.

HAND, J. The counsel for the respondents is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary, and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law as to the burden of proof is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendant's warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of SUTHERLAND, J., in *Schmidt v. Blood*, where "there is a total default in delivering or accounting for the goods," 9 Wend. 268, 24 Am. D. 143, this is to be treated as *prima facie* evidence of negligence. *Fairfax v. N. Y. C. and H. R. R. Co.*, 67 N. Y. 11, 29 Am. R. 119; *Steers v. Liverpool Steamship Co.*, 57 id. 1; 15 Am. Rep. 453; *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the

reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the cause of his negligence. *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y. 271, 7 Am. R. 327, and cases there cited; *Schmidt v. Blood*, 9 Wend. 268, 24 Am. D. 143; *Platt v. Hibbard*, 7 Cow. 500, note. GROVER, J., in 46 N. Y., *supra*, says, in delivering the opinion of the court, the question is "whether the defendant was bound to go further (i. e., than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction, and that this was contrary to the law and erroneous. So SUTHERLAND, J., in 9. Wend. *supra*, in the case of a warehouseman, says: the *onus* of showing the negligence "seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods." And he cites a note of Judge COWEN to his report of *Platt v. Hibbard*, 7 Cow. 500, in which that very learned author says, criticising and questioning a charge of the circuit judge, "the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use and trover will lie (*Anonymous*, 2 Salk. 655), but when he has shown a loss or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff."

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon

§§ 9, 10 LEGAL RESULTS OF BAILMENT RELATION.

the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real "shifting" of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendant's warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

[Omitting questions of fact.]

The judgment must be reversed and new trial ordered, with costs to abide the event.

All concur, except MILLER and EARL, JJ., absent at argument.
Judgment reversed.

10. THORNE V. DEAS,

4 Johns. (N. Y.) 84. 1809.

This was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New-York to Camden, in North-Carolina. The vessel was lost at sea.

KENT, Ch. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts

the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of *mandatum*, in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a *mandatary*, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some *dicta* (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show, that, by the common law, a *mandatary*, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret, that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the *mandatary*, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetip-*

sum aut per alium, eandem rem mandator exequatur. (Inst. lib. 3. 27. 11.) But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject, is that of *Watson v. Brinth* (Year Book 2 Hen. IV. 3 b.), in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing *had been commenced, and afterwards, by negligence, nothing done*, it had been otherwise. Here the court, at once, took the distinction between *nonfeasance* and *misfeasance*. No consideration was stated, and the court required a covenant to bind the party.

In the next case (11 Hen. IV. 33 a.) an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, *if he had undertaken to build the house, and had done it illy or negligently*, an action would have lain, without deed. Brooke (Action sur le Case, pl. 40.) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, &c., and that in the above case, it is assumed, that there was no sum of money, therefore it was a *nudum pactum*."

The case of 3 Hen. VI. 36 b. is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended, that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, Ch. J.) was in favor of the action, but

he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke (Action sur le Case, pl. 7. and Contract, pl. 6) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise, it was a *nude pact*; and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether *assumpsit* would lie for a *nonfeasance*, agitated the courts in a variety of cases, afterwards, down to the time of Hen. VII. (14 Hen. VI. 18 b. pl. 58. 19 Hen. VI. 49 a. pl. 5. 20 Hen. VI. 34 a. pl. 4. 2 Hen. VII. 11. pl. 9. 21 Hen. VII. 41 a. pl. 66). There was no dispute or doubt, but that an action upon the case lay for a *misfeasance* in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a *nonfeasance*, or non-performance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the *dicta* of the judges in them, go so far as to say, that an *assumpsit* would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41. and it is given as a loose *note* of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not built it, I have an action on the case for this *nonfeasance*, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a *nonfeasance* for which an action on the case lies, he states a consideration paid. This case, however is better reported in Keilway, 78. pl. 5., and this last report must have been overlooked by the author of the "Essay." Frowicke, Ch. J., there says, "that if I covenant with a carpenter to build a house, and pay him 20l. to build the house

by a certain day, and he does not do it, I have a good action upon the case, *by reason of the payment of my money; and without payment of the money in this case*, no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the *nonfeasance, if the money be paid*, action upon the case lies.”

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, in that Essay, I hazard nothing in asserting, that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which, a different rule had been adopted. The case of *Wilkinson v. Coverdale* (1 Esp. Rep. 75.), was upon a promise to cause a house to be insured, and Lord Kenyon held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In *Smith v. Lascelles* (2 Term Rep. 188.), Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of *misfeasance*, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by Buller, to cases of *nonfeasance*, for so it seems to have been applied in *Webster v. De Tastet*. (7 Term Rep. 157.) They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law-merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. (Malyne, 81. Beawes, 44.) In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurance for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz. to procure the insurance of a vessel and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, *quoad hoc*, a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial

§§ 10, 11 LEGAL RESULTS OF BAILMENT RELATION.

agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

11. LEACH V. FRENCH,

69 Me. 389; 31 Am. R. 296. 1879.

Assumpsit for board, keeping and burial of a horse.

BARROWS, J. The case, as stated in the report, is that the defendant owned the horse, for the board and keeping of which while sick, and the expense of its removal when dead, plaintiff brings this action, under the following circumstances:

Defendant let the horse to one Devereux. The horse became diseased and sick while thus let, and Devereux left him with the plaintiff for care and cure. While plaintiff was keeping the horse defendant wrote him informing him that he (defendant) owned the horse and inquiring about its condition, and saying that an uncle of Devereux would pay the bill. After the horse died plaintiff's attorney wrote defendant demanding payment of the bill. Defendant answered, "Please not make any costs on it (the bill) as I will call and settle the same soon." Plaintiff's attorney thereupon wrote defendant saying he would wait. After waiting awhile, in pursuance of this arrangement, payment not being made, this suit was brought. Defendant denies his liability to pay for the expenses of his horse thus incurred, and contends that there was no valid consideration for his express promise to do it. Unless there was an original liability on his part by reason of the circumstances and acts of the parties while the plaintiff was furnishing the care and board of the horse, it may well be doubted whether a valid consideration is shown for the promise in defendant's letter to the attorney.

We do not find it necessary to decide that question, for as the case is stated, we think, upon natural and legal presumptions, it is made to appear that the plaintiff might well charge the keeping of the horse to its owner, and that the defendant would be liable for the bill without any express promise.

The first inquiry is, what were the respective rights and

duties of the defendant and Devereux under the circumstances disclosed?

"If a man hires a horse," remarks LUMPKIN, J., in *Mayor of Columbus v. Howard*, 6 Ga. 213, "he is bound to ride it moderately and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer, he is not responsible to the owner for the consequences. The owner of the animal must bear them.

But if the horse falls sick or becomes exhausted the hirer is bound not to use it. And if he does pursue his journey and use it when reasonable care and attention would forbid, he would make himself responsible to the owner for that act. *Bray v. Mayne*, Gow. 1 (5 E. C. L. 437).

On the other hand, one who lets a horse impliedly undertakes that the animal shall be capable of performing the journey for which he is let, and if without the fault of the hirer he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services. *Harrington v. Snyder*, 3 Barb. 380.

Upon whom, then, as between Devereux and the defendant, should the expense of keeping and caring for the defendant's horse, which "became diseased and sick while in Devereux's hands," fall? Up to the time when he fell sick it was Devereux's business to furnish him at his own proper expense with "meat for his work." But how was it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of Devereux, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal—an expense which enures directly to his benefit. There would be good reason for holding that in such case the hirer is, *ex necessitate*, the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still, if instead of applying to a farrier, he undertakes to pre-

§ 11 LEGAL RESULTS OF BAILMENT RELATION.

scribe for the beast himself, and by his unskillfulness does it a mischief, he assumes a new degree of responsibility, and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse. *Deane v. Keate*, 3 Camp. 4.

But it is unnecessary in this case to determine the extent of the hirer's authority as agent for the owner, for the report shows that while plaintiff was keeping the horse defendant wrote to him mentioning his ownership and inquiring as to the condition of the animal. Since he thus knowingly availed himself of the plaintiff's services and outlay in the premises, the law will imply a promise on his part to do what was right and pay the plaintiff for them. Nor could the fact that he gave the plaintiff an assurance that Devereux's uncle, who was certainly under no legal obligation so to do, would pay the bill, make any difference with regard to plaintiff's right to charge the keeping of the horse to its owner who knew he was keeping it. "The horse became diseased and sick while in Devereux's hands." There is nothing here to show that it was by the fault of Devereux. The language used rather indicates the contrary, and the legal presumption is against it. Negligence and misdoing are not to be presumed, but there must be some positive evidence of them. *Cooper v. Barton*, 3 Camp. 5; *Tobin v. Murison*, 9 Jur. 907. It is not enough to show that the horse became disabled, but he must show that he became so by the fault of the hirer. *Harrington v. Snyder*, *ubi supra*.

It is not the case of property, while in the possession of a bailee for hire, receiving an injury, which could not ordinarily occur without negligence on the part of the custodian, when it would be for him to show that the injury was not caused by his negligence. *Collins v. Bennett*, 46 N. Y. 490.

We think the case as stated shows a good consideration for an implied promise on the part of defendant to reimburse the plaintiff for his outlay in defendant's behalf. Hence, perhaps, defendant's readiness to promise payment if he could have a little delay.

Defendant defaulted.

12. WENTWORTH V. McDUFFIE.

48 N. H. 402. 1869.

Trover for a horse. The jury found that plaintiff hired a horse and buggy to defendant to drive from Rochester to Dover. Defendant drove the mare to Hoit's, two miles away from the journey agreed upon, and drove her immoderately on a very hot day, so that when she returned to plaintiff's stable she was exhausted and sick, and in about half an hour died. Verdict for plaintiff.

SMITH, J. (Omitting a question of evidence.) Taking into account the nature of the evidence on which the plaintiff relied, the gist of the instructions excepted to would seem to be contained in the last clause, and we are not inclined to think that the jury were misled by the remarks which preceded that clause.

The jury were instructed that "if the defendant willfully and intentionally drove the mare at such an immoderate and violent rate of speed as seriously to endanger her life, and he was at the same time aware of the danger, and her death was caused thereby, it would be such a tortious act as would amount to a conversion, and trover might be maintained; though it would be otherwise if the fast driving was the result of mere negligence and want of discretion, he not being aware that it endangered the safety or life of the mare."

Two established principles of the law of trover tend to support this instruction. The first is the settled rule in this State, that if the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer. *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. D. 310. This doctrine does not seem to proceed upon the idea that the driving the horse beyond the place named in the contract is conclusive evidence of the bailee's intention to convert the animal to his own use, but rather upon the ground that such use of the property is so substantial an invasion of the owner's rights, and so inconsistent with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby or to his proceeding against the bailee for a conversion. "A conversion consists in an illegal control of the thing converted, in-

consistent with the plaintiff's right of property;" Perley, J., 25 N. H. p. 71. It has been said that, "if the thing be put to a different use from that for which it was bailed," the bailor may maintain trespass or trover, but that "any misuser or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee"; Redfield, J., in *Swift v. Mosely*, 10 Vermont 208, p. 210, 33 Am. D. 197. But we are unable to perceive any just ground for the distinction as stated in these broad terms. If a horse is hired upon the usual implied contract that he is to be driven at a safe rate of speed, the act of the bailee in willfully and intentionally driving the horse at such an immoderate rate of speed as he knew would seriously endanger the life of the horse is at least as marked an assumption of ownership and as substantial an invasion of the bailor's right of property as the act of driving the horse at a moderate speed one mile beyond the place named in the contract of hiring. The probability of injury to the horse is much greater in the former case, and the cruel treatment of the horse is certainly as inconsistent with the continued existence of the contract of bailment as the use of the horse for a different journey.

The other established principle which tends to support this instruction is the doctrine that the willful destruction by the bailee of the thing bailed is a conversion; see *Morse v. Crawford*, 17 Vermont 499, 44 Am. D. 349. If the death of the mare was caused by an act willfully and intentionally done by the bailee with knowledge on his part that the life of the mare was thereby seriously endangered, we think that, so far as the civil remedy is concerned, the bailee may be regarded as having willfully destroyed the mare. If the property is destroyed by the bailee's willful act the bailor's right to maintain trover cannot depend upon the time when the destruction is consummated. "It can make no difference whether the destruction takes place immediately on the commission of the act, or is the necessary result of it." If the bailor had seen that his mare was about to be destroyed by the bailee's willful act, he would have been entitled to terminate the bailment, and retake his property if he could do it without force. When the bailor learns that an act has already been done which will result in the death of the mare, can he not elect to consider the bailment as having been rescinded by the act at the moment of its commission?

It may be urged that the principles referred to as sustaining the instructions are themselves arbitrary exceptions engrafted on the law of trover, and that they therefore do not furnish a foundation upon which to reason from analogy. If we are to look merely to the form of the declaration, very few of the actions of trover now brought would be sustained. The legal fictions which prevail in reference to trover are based upon authority; and however arbitrary the established principles may be, we know of no other test by which to decide any question pertaining to the form of action which has not already been conclusively settled by authority.

The right of a bailor to maintain trespass or trover against a bailee in a case like that supposed in the instructions is a question not conclusively settled by authorities directly in point. *Rotch v. Hawes*, 12 Pick. 136, 22 Am. D. 414, seems favorable to the defendant. *McNeill v. Brooks*, 1 Yerger 73, is cited on the same side, but an examination of the opinion shows that the court did not have in mind such a willful and intentional misuse as that described in the instructions given in the present case. *Swift v. Moseley*, 10 Vermont 208, 33 Am. D. 197, contains a *dictum* favorable to the defendant, but the case itself is not in point; see also Harris, J., in *Parker v. Thompson*, 5 Sneed 349, p. 352. On the other hand *Maguyer v. Hawthorn*, 2 Harrington 71, tends to sustain the plaintiff; as do also *Campbell v. Stakes*, 2 Wend. 137, 19 Am. D. 561; and *Nelson v. Bondurant*, 26 Ala. 341, reaffirmed in *Hall v. Goodson*, 32 Ala. 277; see also *James v. Carper*, 4 Sneed 397.

We think the instructions were correct.

Judgment on the verdict.

13. ARMORY V. DELAMIRIE,

1 Strange 505. 1721.

In Middlesex, *coram* Pratt, C. J.

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to

§§ 13, 14 LEGAL RESULTS OF BAILMENT RELATION.

three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.

14. LITTLE V. FOSSETT,

34 Me. 545; 56 Am. D. 671. 1852.

Trespass for damages to a hired wagon and harness, injured by negligence of defendant in driving against the wagon on the highway. The court below refused an instruction that one having a mere temporary possession could not sue for a permanent injury. Exceptions to such refusal. Verdict for plaintiff.

By COURT, APPLETON, J. The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. The longer or shorter period of such bailment, the greater or lesser amount of compensation—and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan does not seem to affect the question. “The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer:” 2 Kent’s Com. 574. By the common law, in virtue of the bailment, the hirer acquires a special property in the thing

during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right: Story on Bail., sec. 394. In *Croft v. Alison*, 4 Barn. & Ald. 590, the court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In *Nicolls v. Bastard*, 2 Crompt. M. & R. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee's possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. "If," say the court, in *White v. Webb*, 15 Conn. 302, "the suit is brought by a bailee or special propertyman against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of authority: *Lyle v. Barker*, 5 Binn. 457; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Chesley v. St. Clair*, 1 N. H. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

15. GREEN V. HOLLINGSWORTH,

5 Dana (Ky.) 173; 30 Am. D. 680. 1837.

Detinue for the wrongful detention of a watch. Judgment for defendant, and plaintiff excepts.

By COURT, ROBERTSON, C. J. Hollingsworth having obtained a verdict and judgment against Green, in an action of detinue, for a gold watch, several errors are assigned by Green, as arising

from instructions and refusals to instruct the jury on the trial.

It appears from the bill of exceptions, that the parties being intimate acquaintances and cordial friends, and both being in a jocund mood on a public occasion, while Hollingsworth was a candidate for the legislature, Green said to him, in the hearing and presence of several persons, "Give me your watch and I will vote for you, and do all I can to assist you in your election"; whereupon Hollingsworth handed the watch to him, without the chain, and Green having fastened a twine string and a key to it, put it in his pocket, and they shortly afterwards separated, Green still retaining the watch; about three weeks after which, Green, being on a hunting excursion, with the watch in his pocket, said, on his return home, that he had lost it in the woods; and having afterwards engaged others to assist in searching for it, and not finding it, he offered a reward of ten dollars for its discovery and restoration; but the witnesses never heard that it had ever been seen since; that some time after the alleged loss of it, Hollingsworth requested Green to return it, which he, of course, failing to do, this suit was brought for a wrongful detention of it. The jury had to decide whether the foregoing facts conduced most strongly to establish a gift, a loan, a deposit, or a sale on an illegal consideration; and if there was no sale nor gift, it was the province of the jury to decide whether the bailment was a loan or a mere deposit, and whether the watch had, as alleged, been lost; but it was the province of the court to decide respecting the degree of care required by law, according to the facts.

Hollingsworth could not recover, unless the jury had concluded that the watch had been bailed to Green; for it is evident that if it was sold upon an illegal consideration, although the contract was void, the law would not help either party, standing, as they would, in equal fault. It is to just such a case that the maxim *in pari delicto potior conditio defendentis*, is conclusively applicable. And whether, upon the hypothesis that there was a bailment, there should have been a recovery, depends on the following considerations:

1. If the bailment was a simple deposit, with implied leave to carry the watch in the pocket, and if it was lost by the bailee, he is not liable unless he was guilty of gross negligence, or unless, prior to the loss, he had violated his implied obligation to return it in a reasonable time, and thereby rendered

himself responsible for all consequences; and whether, without demand, it was his duty to have returned it within three weeks after the date of the deposit, was a question of law for the court, and not the jury, to decide. But the evidence will hardly allow the deduction that there was a mere deposit; and if it would, it would perhaps also show that it was a deposit at the instance of Green, rather than of Hollingsworth, and therefore required the observance of ordinary care, at least.

2. If there was a simple loan, more than ordinary care was required by law. And if the watch was in fact lost, as alleged, it was the province of the court to decide as to what was gross, ordinary, and slight neglect, and that of the jury to determine whether the facts established the one, or the other, or any degree of negligence. If the watch was loaned to Green, when it was to be returned was a fact to be ascertained by the jury from the circumstances proved; and if those circumstances conduced to establish no special time, and, from the nature of the transaction as proved, the jury could have inferred that the parties actually intended a beneficial loan, the law made it the duty of Green to return the watch in a reasonable time. But, in such a state of case, of indefinite loan for use, a court could not decide that Green was guilty of a breach of his implied obligation, in not returning the watch within three weeks, or the time that elapsed before the alleged loss of it. Nor could it be decided, as a matter of law, upon the facts proved, that there was gross or even slight neglect in carrying the watch in his pocket when he was hunting. The use of it may have been, and probably was, especially important on such an occasion; and therefore, if there was culpable negligence in thus using it, the consequence might be that he could not have used it at all, without being responsible for an accidental loss of it in consequence of using it. But there may, *prima facie*, have been at least slight neglect in losing the watch out of his pocket.

If the watch was loaned without any express agreement, and if Green failed, upon a demand of restitution, to return it, while he had it, or converted it, in judgment of law, by seriously claiming it as his own, he would be liable for it, whatever may have happened to it, without the agency or assent of Hollingsworth. But there is no proof of any such demand or conversion prior to the loss of the watch. And if the parties did not intend a bailment, there was no ground for serious contro-

§§ 15, 16 LEGAL RESULTS OF BAILMENT RELATION.

versy. There is scarcely a pretext for presuming a sale—it is much more probable that there was a gift.

As the instructions given by the circuit judge were, in some respects, essentially variant from the foregoing principles, and may have been, to some extent, prejudicial to the plaintiff in error, the judgment must be reversed, and the cause remanded for a new trial, without any intimation as to whether the verdict could have been sustained had there been no error in the instructions.

16. ALLEN V. DELANO,

55 Me. 113; 92 Am. D. 573. 1867.

REPLEVIN for a colt. The plaintiff sold the defendant a mare, taking his note therefor, with a written agreement added that said mare should continue the property of the vendor till paid for. The mare was with foal at the date of the writing, and that offspring was the colt replevied. The note was unpaid at the commencement of the suit. The plaintiff was nonsuited, and alleged exceptions.

By COURT, APPLETON, C. J. The nonsuit must be set aside, and the case stand for trial.

The plaintiff's title to the mare is not questioned. By the terms of the contract, no title vested in the conditional vendee.

The plaintiff, owning the mare, owned likewise the colt. "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil that *partus sequitur ventrem* in the brute creation, though for the most part in the human species it disallows that maxim": 2 Bl. Com. 390. And so are all the authorities. Putting a mare to pasture in consideration of her services does not entitle the bailee to her increase: *Allen v. Allen*, 2 Penr. & W. 166. In case of a pledge, not only the thing pledged passes, but also, as accessory, its natural increase, as, for instance, the young of a flock of sheep: Story on Bailments, sec. 292. Where live stock is mortgaged, its natural increase and produce becomes subject to the mortgage: *Forman v. Proctor*, 9 B. Mon. 124. The increase of domestic animals gratuitously loaned belongs to the lender: *Orser v. Storms*, 9 Cow. 687 [18 Am. Dec. 543]. Where a mare was sold on condition the vendor continued to be the

owner of her colts until performance of the condition: Buckmaster v. Smith, 22 Vt. 203. The defendant, having no title to the mare, can have none to her increase.

Exceptions sustained.

17. ESMAY V. FANNING,

9 Barb. (N. Y.) 176. 1850.

TROVER for a carriage. The cause was referred to a referee, who reported that he found as facts that about the 1st of June, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be re-delivered to the plaintiff on request; that the defendant had been requested to redeliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about the 1st November, 1846, during which time it was used occasionally by both parties, plaintiff and defendant. That about the first of November, 1846, it was returned by the defendant to the stable of said Crocker; *which return of the carriage to the stable of Crocker, the referee decided was not a re-delivery of the carriage to the plaintiff or his agent.* He, therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage.

The defendant appealed from the decision of the referee.

By the Court, WILLARD, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. (3 Barn. & Ald. 685.) The general requisites to maintain the action are, property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. (4 Barb. 56.) The plaintiff's title was not disputed in this case. The issue is on the conversion; or, in other words, it is whether the defendant re-delivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to re-deliver it, and the defendant avers that he did re-deliver it. The referee found

the fact that the defendant did not re-deliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux v. Barclay* (2 Barn. & Ald. 702), it was held that trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery was occasioned by mistake only—and this court, in *Packard v. Getman* (4 Wend. 613, 21 Am. D. 166), held that the same action would lie against a common carrier, who had delivered the goods, by mistake, to the wrong person. The same point was ruled by Lord Kenyon in *Youl v. Harbottle* (Peake's N. P. Cases, 49), and by the English Common Pleas in *Stephenson v. Hart* (4 Bing. 476). If trover will lie against a common carrier or a warehouseman for a mis-delivery, it can, under the like circumstances, be sustained against a bailee for hire, or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. (Story on Bail. § 414.)

The referee found as a fact that the carriage was not re-delivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it can not be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. (*Barns v. Graham*, 4 Cowen, 452, 15 Am. D. 394. Story on Bail. §§ 257, 261, 265.) A delivery elsewhere, without authority, was a conversion. We

have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. (Story on Bail. § 117.)

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession; unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. (2 Leigh's N. P. 1483. *Bates v. Conklin*, 10 Wend. 389. *Tompkins v. Haile*, 3 Id. 406.) As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee, refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument, on the *implied* obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject, in this case, because here there was an *express* agreement to return the property to the plaintiff, on request.

The judgment must be affirmed.

PART II.

OF ORDINARY BAILMENTS.

I. OF GRATUITOUS BAILMENTS.

CHAPTER III.

A. OF GRATUITOUS SERVICES.

18. NEWHALL V. PAIGE,

10 Gray (Mass.) 366. 1858.

ACTION OF CONTRACT, with a count in tort, to recover the value of merchandise sent from Portland, Maine, by steamboat to Boston, marked "H. B. Newhall, Saugus, care R. M. Morse, South Market St., Boston," and lost under the following circumstances: "Upon its arrival in Boston it was delivered to the teamster of the steamboat company, who took it to the defendant's store, where was the order box of an expressman who ran an express to Saugus. As this expressman did not run to that part of Saugus where the plaintiff lived, he told another expressman, George Towne, who kept a box in another part of the city, and went by the plaintiff's house, to call and take the merchandise. Towne called, paid the freight bill, and the defendants could not then find the merchandise. The only compensation received by the defendants for receiving and storing merchandise left for expressmen, and for allowing expressmen to have boxes in their store, was the advantage in bringing them business. The defendants kept a liquor store."

Plaintiff asked a ruling that this advantage was a compensation sufficient to make defendants bailees for hire, and excepted to the instruction given to the jury on this point. Verdict for defendants.

BIGELOW, J. The only error in this case was in the instructions given to the jury, and consisted in telling them that the

defendant could not be considered a bailee for hire unless his compensation was for some certain benefit to himself, and that a mere contingent, uncertain and indirect benefit would not constitute such a consideration as was necessary to establish a contract of bailment for hire or reward. This was stating the proposition more broadly than the rules of law will warrant. A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum* and not a *depositum*, and the defendants were liable for a want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may enure to the benefit of the party making the promise. *Haigh v. Brooks*, 10 Ad. & El. 320, and 2 P. & Dav. 484. *Lawrence v. McCalmont*, 2 How. 452. *Hubbard v. Coolidge*, 1 Met. 92. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*, nor a bailment a gratuitous undertaking.

Exceptions sustained.

19. FOSTER V. ESSEX BANK,

17 Mass. 479; 9 Am. D. 168. 1821.

Assumpsit by executors of Israel Foster to recover \$50,000 deposited by Foster with the bank for safe keeping, and stolen by their cashier and chief clerk. The cask containing the gold was weighed in the presence of the president and cashier, but the directors had no knowledge of this deposit, though it had been the custom of the bank to receive special deposits. No special account was kept by the bank of such deposits. With this gold was stolen most of the capital of the bank, and it appeared the books had been falsified for more than two years, during which they had not been regularly posted.

By COURT, PARKER, C. J. This is *assumpsit* to recover of the defendants the value of certain gold deposited by the plaintiffs' testator in the bank, of which the defendants are the proprietors; and the facts upon which the action is founded, are established by a special verdict found by the jury who tried the issue. Those facts are multifarious, and present several very important questions of law, which have been investigated by the counsel with all the research and ability which novelty, in their application to a subject of so general concern as banks seemed to demand. No case has, however, been produced on either side so apposite as to relieve the court from an inquiry into the general principles on which the action is founded; and after all the pains which other public engagements have allowed us to bestow on this particular case, no authorities have been discovered, having an essential bearing upon it, which had escaped the diligence of the counsel employed in the argument.

The public importance of the questions has induced us to delay forming a conclusive opinion, while there was any room to suppose we might be mistaken; and doubts, which have until a late period prevailed with one or other of us, owing to a want of time for examination, rather than to any intrinsic difficulty in the case, have occasioned repeated revisions of the arguments of counsel, and frequent recurrence to the authorities cited. Our minds are now definitely settled; and we hope to be able to show that the result we have come to is supported by the best-approved principles of the common law, and conformable to decisions, ancient and modern, in analogous cases. In attempting to do this, we shall consider: 1. Whether the bank made any contract with the plaintiffs' testator; 2. What is the nature of that contract; 3. Whether it has been violated.

1. On the first point we have had little difficulty; for, notwithstanding the act of incorporation gives no particular authority or power to receive special deposits, and although the verdict finds that there was no regulation or by-law relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way, and as the practice was known to the directors, and, we think, must be presumed to have been known to the company, as far as a corporation can be affected with knowledge;

and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered the depositary, and not the cashier or other officer through whose particular agency commodities may have been received into the bank.

No authorities are necessary to support this position. It rests upon common and familiar principles. The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so if the servant, secretly and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties. And this brings us to the consideration of the second point, viz.:

2. The nature and legal qualities of this contract. It will not be disputed that if it amounts only to a naked bailment, without reward and without any special undertaking, which in the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of it. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind. For, although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns.

This principle, although denied by Lord Coke, as in 1 Inst. 89, b, has been received as the law regulating gratuitous bailments, as it is sometimes called, or mere deposit, where there is no advantage but to the depositor, from the luminous opinion

of Lord Holt in the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, down to the profound and brilliant treatise of Sir William Jones, in which, with a wonderful mixture of learned research and classical illustration, he has analyzed the complicated contract of bailment, and applied the principles of moral philosophy, the doctrines of the civil law, and the usages of all nations, ancient and modern, to the different branches of this diversified subject, so as to leave little room for speculation, except as to the application of his rules to particular cases as they arise.

The *dictum* of Lord Coke that the bare acceptance of goods to keep implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and Sir W. Jones insists that such a harsh principle cannot be inferred from Southcote's case, 4 Co. 83, on which Lord Coke relied; the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings, from which it might be inferred either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges Gawdy and Clench, who alone decided that cause, said that the plaintiff ought to recover, because it was not a special bailment, by which the defendant accepted to keep them as his own proper goods, and not otherwise: S. C., Cro. Eliz. 815; the inference which Lord Coke drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the *dictum* of Lord Coke in his Commentary, were fully and explicitly overruled by all the judges in the case of *Coggs v. Bernard*, and upon the most sound principles. It is so considered in Hargrave and Butler's note to Co. Lit. n. 78, and all the cases since have adopted the principle, that a mere depositary, without any special undertaking and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is everywhere observed, bears so near a resemblance to fraud as to be equivalent to it in its effect upon contracts.

Indeed, the old doctrine, as stated in Southcote's case, and by Lord Coke, has been so entirely reversed by the more modern decisions that instead of a presumption arising from a mere bailment that the party undertook to keep safely, and was therefore chargeable unless he proved a special agreement to keep

only as he would his own, the bailor, if he would recover, must in addition to the mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to Sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretion; so that if goods deposited with one who engaged to keep them safely were stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee.

And Sir William Blackstone, in his commentary, recognizes the same principle; for he says, "If a friend delivers anything to his friend to be kept for him, the receiver is bound to restore it on demand; and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise, unless he expressly undertook to keep them only with the same care as his own goods; and then he should not be answerable for theft or other accidents. But now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertake specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own": 2 Bl. Com. 453. And this certainly is the more reasonable doctrine; for the common understanding of a promise to keep safely would be, that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement, and an adequate consideration therefor.

The doctrine, as thus settled by reason and authority, is applicable to the case of a simple deposit, in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable. If we proceed one step further in the gradation of liabilities, we shall discover

every legal principle which can by possibility affect this cause, considered as founded on a contract of bailment. It was urged by the plaintiff's counsel that this is not a naked bailment, but is accompanied with an advantage from the use of the property, or the credit derived from the custody of it; and that this ought to be viewed in the light of a reward, so that the case will be brought within the principle of bailment for hire or reward. If it be so, the principle applicable to this species of bailment goes no further than to make the bailee liable in case of ordinary neglect; so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused. This is the doctrine of Sir William Jones, and was the opinion of Lord Kenyon in the case of *Finnucane v. Small*, 1 Esp. 315, cited in the argument, which, though a *nisi prius* decision, is satisfactory evidence of the law, as two very eminent sergeants acquiesced in his opinion. And this is also reasonable, for one who takes goods into his warehouse to keep for a stipulated price, does not intend to insure them against fire and thieves. His compensation is only in the nature of rent; or if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse as other prudent people do, and thieves break through and steal, he ought not to be accountable; if he leave the door or windows open, he ought to be. The common sense of mankind must acquiesce in these reasonable provisions of the law; and without doubt the common dealings of men are governed by them as principles of natural justice, without a knowledge of the positive law.

Having thus settled, satisfactorily to ourselves, the principles by which our judgment in this action is to be guided, we proceed to a consideration of the facts, in order to ascertain under what species of bailment the plaintiffs' property was committed to the keeping of the defendants. It has been before observed that as it was received into their building and placed in their vaults by their servants, according to a practice allowed of by them, they must be responsible in some degree, and are bound to restore it, or the value, unless it has been lost by some accident for which they are not liable by the nature of their contract. We think there is no doubt that on such a deposit an action of trover would lie against the corporation, if they should refuse to deliver the property on demand, and *assumpsit*

might also be maintained, it being settled by the later authorities that either action may be maintained against an incorporated company, as well as against a natural person, although the doings on which the action is founded are not verified by the seal of the corporation. *Vide* the opinion of Mr. Justice Story in the case of *The Bank of Columbia v. Patterson*, 7 Cranch, 299, in which all the learning upon the subject of corporate liabilities is exhausted.

Looking into the special verdict, we find the money of the plaintiffs' testator contained in a chest which was locked, and the key kept by his agent, was received into the bank by W. S. Gray, the cashier, in the presence of W. Orne, who was president of the bank at the time. The money, being gold, was weighed in the presence of the president and cashier, and a memorandum of the different pieces in separate bags taken by the cashier and given to Mr. Bond, the testator's agent, with the writing signed by Mr. Gray as cashier, viz., "Left at Essex Bank for safe-keeping." The verdict finds that the chest containing the gold was left at the bank as a special deposit; that the bank was not authorized to use the money, or treat it otherwise than as a special deposit; that it was kept in the vault of the bank until it was removed to Haverhill for better security in time of war, with the consent and at the expense of the owner; that after the danger was over it was brought back and replaced in the vaults of the bank, with the specie belonging to the bank, and there remained until it was pilfered as afterwards stated in the verdict. Mr. Bond, the agent of the owner, was in the practice of coming to the bank to look into the vault to see that the money was safe, but it did not appear that he opened the cask or counted the money. Some of the doubloons were delivered to the agent, on the order of the testator, by the cashier in August, 1817; and at other times other doubloons were delivered in the same manner on similar orders. At each of these times the cask was opened by the cashier or chief clerk to deliver the doubloons pursuant to orders. This was done without the knowledge of any of the directors. They knew nothing of the delivery of the doubloons, nor was any account taken of them in the books of the bank. It is found that no return or statement of special deposits was ever made to the directors by the cashier; and that such deposits are made and taken away without the particular knowledge of the directors,

although they know it is the practice so to receive and take them. The directors knew nothing of the nature or amount of this or any other special deposit, unless such knowledge may be presumed from the agency of the president and cashier in receiving this deposit, or of the cashier when he delivered the doubloons pursuant to orders. And it is found not to be the practice of this or any other bank, for the directors to inspect or examine special deposits, and it is considered improper for any officer to do so without the consent of the depositor.

Upon this state of facts, we think it must be manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest, or of the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for any price of its custody, and it was not thought that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or a simple deposit, this was one, unless the memorandum given by the cashier altered its character, or unless the nature of such a deposit is such as to have given the bank a right to derive profit from it; both of which points have been contended for by the counsel for the plaintiffs.

As to the first of these points supposing the bank to be answerable for any special undertaking of the cashier, we perceive no evidence of such an undertaking in this case. The writing signed by the cashier is merely a memorandum, signifying that the chest and its contents were left in the bank for safe-keeping. It contains no promise, and assumes no risk other than would be derived from the mere delivery without any writing. Nor does it receive any additional force from the presence of Mr. Orne, and his certificate of the gold having been weighed in his presence. For in this he did not act or sign officially; and if he had assumed to do so, it not being within the scope of his authority, as president, to charge the bank with any special liability, his act could not have bound the corporation, who, according to the practice as found by the jury, take no notice of special deposits. And the same may be said of the

memorandum signed by the cashier. For if he had undertaken to make the bank specially answerable for a deposit, contrary to its usage, and to the nature of the contract implied by accepting such a deposit, such an undertaking, without previous authority or subsequent assent, would have failed to implicate the bank.

We think, also, that there is nothing in the nature of such a deposit, or in the usages of banks or in the act incorporating the bank, from which any qualities can be attached to this bailment, which do not belong to that class of contracts generally, where the advantage is wholly on the side of the depositor. It was contended that the bank might discount on this property. But if the true nature of a special deposit is understood by us, and we think its character is properly described in the special verdict, we are of opinion this could not be done. For although the bank, by implication, are allowed in the act of incorporation to have credit upon the simple amount of all the moneys deposited for safe-keeping, we are satisfied that the legislature had reference to general deposits only in this provision. It does not appear that this or any other bank ever issued notes upon the credit of special deposits; indeed they could not, as the amount of such deposits, or the value of them, is generally wholly unknown to the directors and the company. The eighth section of the incorporating act, we think, clearly shows that the deposits referred to in the third section are general deposits. For in the eighth section an annual account of the moneys deposited is required to be made to the governor and council, in order that it may be ascertained whether there has been an excessive issue of notes. Now, of special deposits, no such account can be rendered, because none is kept; and we have never heard that any bank has been complained of, as violating its charter, for not rendering an account of such deposits.

We see, then, no profit to the bank arising from special deposits unless it be, as was suggested, that they acquire an increased credit with the community on their account. But any credit founded upon such deposits would be fallacious, since they cannot be meddled with by any officer of the bank, although authorized by a vote of the corporation, without a breach of trust, which would subject them to an action. As to the idea suggested, that the business of the bank may be facilitated and increased by the accommodation given to special depositors, the advantage, if any, is too minute and remote to effect their

liability. Such deposits are, indeed, simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-houses or stores; and this is rendered more probable from the well-known fact, that not only money or bullion, but documents, obligations, certificates of public stocks, wills and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe keeping. This is wholly different from the deposits contemplated in the act on which notes may be issued, for they enter into the capital stock, become the property of the bank, as much as their other moneys, and the bank become debtors to the depositors for the amount.

3. The contract in the present case being then only a general bailment, the third question to be discussed is, whether the contract has been executed by the bank. I use the word bank for the corporation, consisting of the president, directors and company, for the sake of brevity.

The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable in case of loss for gross negligence only, or fraud, which will make a bailie of any character answerable. Gross negligence certainly cannot be inferred from anything found by the verdict; for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. The want of books, showing the number and amount of deposits is not a culpable negligence; for the acceptance of the deposit being voluntary, the bank was not obliged to incur any labor or expense in this respect; and, besides, the agent of the depositor required nothing but a memorandum from the cashier; and this was more than he could have insisted on as a right. As to the supposed neglect and carelessness of the directors, in not inspecting the cashier's accounts more strictly, so as to have detected his fraudulent management of the books to cover his speculation; this concerned the property of the company, not that of special depositors; and the reputation of the cashier, and general confidence in him, found by the verdict, is a sufficient answer to any charge of negligence in his original appointment or continuance in office.

We have thus prepared the way for the discussion of the

great question in the case, and we believe, the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence; and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. Fraud on property deposited, committed by the depositary, or his servants acting under his authority, express or implied, relative to the subject-matter of the fraud, is equivalent to gross negligence, and renders the depositary liable. No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect.

The point, then, is narrowed to this consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers; and here it being thought there was some discrepancy in the authorities, we have felt ourselves obliged to examine minutely all which have been cited, and all others having a bearing on the question.

It was contended, by one of the counsel for the plaintiffs, as a proposition universally true, that the principal is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of Lord Kenyon, in the case of *Doe v. Martin*, and also by Lord Ellenborough, in 1 Campb. 127. And yet, it must strike the mind of every man of sense, that this universal proposition will admit of, and indeed, upon principles of common justice, actually requires, considerable qualifications. No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty toward me, that I shall be civilly answerable for such fraud. If I send him to market, and he steps into a shop and steals, or, upon false pretenses, cheats the shopkeeper of his goods, I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire; and yet the proposition, as stated, will embrace a case of this kind. The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master; and this was the state of things in both the

cases which are cited to support the proposition, and they go upon the principle of an implied authority to do the act.

The rule of law is correctly laid down by Sir William Blackstone, 1 Bl. Com. 429, viz., "that the master is answerable for the act of his servant, if done by his command, either expressly given or implied." And in another place, "If a servant by his negligence does any damage to a stranger, the master shall answer for his neglect, but the damage must be done while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehavior:" Id. 431. The same rule will apply more strongly to frauds practiced by the servant. Christian, in a note to this passage, approves this doctrine, and illustrates it with some observations of his own.

The supreme court of the United States recognize the same doctrine in the case of *The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat. 326, in which it is said that the liability of the principal depends upon the facts: 1. That the act was done in the exercise; and 2. Within the limits of the powers delegated. Any act, they say, within the scope of the power or confidence reposed in the agent, such as money credited in the books of the teller of a bank, or proved to have been deposited with him, although he omits to credit it. And in the case of *Ellis v. Turner*, 8 T. R. 533, Lord Kenyon says: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them, as if he, being master of the defendants' vessel, were to commit an assault upon a third person in the course of his voyage." And upon the same principle it has been holden that if a servant willfully drive his master's carriage against the carriage of another, the master is not liable for the damages: 1 East, 106. And the reason is the same; for in such case there is no authority from the master, express or implied; the servant in that act not being in the employment of his master. In the case here referred to, the master was not in the carriage at the time; the law would have been the same if he had been present, and had endeavored to prevent the act; the presence of the master being only presumptive evidence of authority.

I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his

employment; and that if he steps out of it to do a wrong either fraudulently or feloniously towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule founded on public policy.

We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask, or open it, and so could not lawfully communicate any authority; and that they did not, in fact, give any, is found by the verdict. Nor did they in any manner assent to, or have any knowledge of it. There are no circumstances, then, from which such authority can be implied. The chest or cask when once placed in the vault was to remain there until taken away by the owner, or ordered away by the bank; either party having a right to discontinue the bailment. It was never opened but by order of the owner until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents, or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over, that this, together with other property there, should be secure from theft. He cannot, therefore, be considered, in any view, as acting within the scope of his employment when he committed the villainy, and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank.

If it be asked for what acts then of a cashier or clerk the bank would be answerable, I should answer, for any which pertain to their official duty, for correct entries in their books, and for a proper account of general deposits, so that, if by any mistake or by fraud in these particulars any person be injured, he would have a remedy. If they should rob the vaults of the property of the bank, the company would necessarily lose; and if the bank have become debtors to those who have deposited otherwise than specially, their debts will not be diminished by the fraud; so that in this form they are answerable to depositors,

and for the correct conduct of all their servants, in their proper sphere of duty, they are answerable. They may also be answerable for notices to indorsers upon bills and notes left with them for collection, if there should be a failure by neglect of any of their servants, because they have undertaken to give the proper notices. But even in that case it may admit of a question whether they would be liable any further than attorneys who undertake the collection of debts, would be. But they are not answerable for special deposits stolen by one of their officers any more than if stolen by a stranger, or any more than the owner of a warehouse would be who permitted his friend to deposit a bale of goods there for safe-keeping, and the goods should be stolen by one of his clerks or servants.

The undertaking of banking corporations, with respect to their officers, is that they shall be skillful and faithful in their employments; they do not warrant their general honesty and uprightness. And it is the same with individuals. If a friend commit to my care valuable property to keep for him, and it be stolen by my servants, I shall not be answerable for the loss, as was stated by Lord Kenyon in the case of *Finnucane v. Small*. This case, before referred to for another purpose, deserves special notice upon this point; for if it be law, it goes the whole length of the case before us, and even beyond it; for the bailee there received a reward for his custody of the goods which were stolen. The plaintiff was an officer in the army, and being about to leave London, sent his trunk to the defendant's house for safe custody, and was to pay one shilling a week for house-room. When he returned he received the trunk, but the contents had been stolen. Lord Kenyon held the defendant not liable, it appearing that he had taken as much care of the trunk as he had of his own goods; and that if the goods were stolen by the defendant's servants, as was stated to have been the fact by the plaintiff's counsel, it would make no difference. His lordship no doubt considered the hire agreed to be paid as mere compensation for house-room, not as a reward for diligence and care, and therefore did not require of the defendant more care than he used about his own goods, considering it as a simple deposit only. Whether he was right or not in this, there is no doubt of the correctness of his opinion with respect to the agency of the servants in the theft; for they were not in the course of their duty when pilfering the trunk of its contents.

Garrow and Shepherd, eminent sergeants, and since judges, acquiesced in the opinion.

The case is in all respects like the one before us, except that the goods were to be kept for hire; and the difference is altogether in favor of the defendants in the present case. In answer to this, it was observed by the counsel for the plaintiffs that the cashier of the bank was trusted, and therefore, the doctrine of Lord Kenyon did not apply. But if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having anything to do with the chest or cask but to give it a place in the vault, and to lock it up when the hours of business were over; and so the cashier must be considered like the servant in the case cited.

Some stress was laid in the argument upon the security taken by the bank of the cashier for the faithful discharge of his duty. But we think it obvious that nothing was contemplated in the security but the official neglect of the cashier. The act of incorporation authorizes the bank to require bonds, in a sum not less than ten thousand dollars; and a bond was taken for that sum only. Now, considering this as one of the oldest banking companies in one of the most wealthy towns in the commonwealth, without doubt special deposits of a vast amount were from time to time received into the bank for safe-keeping, and a bond for ten thousand dollars could never have been taken to indemnify against a possible loss of these.

Upon a view, therefore, of all the points in the case, and after a careful attention to the arguments and authorities, we are satisfied that upon the special verdict, judgment must be entered for the defendants.

Costs for the defendants.

20. KNOWLES V. ATLANTIC AND ST. LAWRENCE
RAILROAD CO.,

38 Me. 55; 61 Am. D. 234. 1854.

Action to recover for the loss of sixteen tons of hay.

By Court, RICE, J. The evidence in the case shows that the original contract of the defendants, as common carriers, was fully executed to the satisfaction of the plaintiff. Howe, the

forwarding agent of the railroad company, in his deposition states that "I told Mr. Knowles that the hay was now delivered in good order; that that was an end of our contract, and that it must now be at his risk against any damage. He replied that he acknowledged he received it in good order." The defendants, therefore, clearly are not liable as common carriers. The case provides that if, in the opinion of the court, the plaintiff is entitled to recover in any form of declaring, the defendants are to be defaulted. It is contended that they are liable as bailees or depositaries. The hay was permitted to remain upon the defendant's cars for the accommodation of the plaintiff, and at his special request. For this the defendant received no additional compensation nor consideration. At most, therefore, they were naked bailees or gratuitous depositaries.

The defendants contend that there was no responsibility upon them; that the whole risk of loss or damage to the hay was assumed by the plaintiff. Mr. Hamlin, who acted as agent for the plaintiff, testified that "Mr. Howe consented that the hay might remain on the cars (until it could be shipped), with the understanding that the whole risk should be on Mr. Knowles. Mr. Knowles asked at the time, 'Is there any risk?' or something like that. I told Mr. Knowles, Howe being present at the time, that there was a risk; that there was a risk in all cases. He asked, 'What risk?' I told him there was the risk of fire and water or rain; and there were other risks which could not then be thought of—there were a thousand risks. After a little more conversation it finally ended in Mr. Knowles assuming the whole risk; * * * that it should remain on the cars, and at his risk, until it was shipped."

This witness further testified that the cars on which the hay then was were on the principal track, from which they must be removed to make room for other trains. The track down on the wharf, and the one where the cars then stood, were the only tracks from which freight could be shipped.

This was on the sixteenth of July, 1851. On the eighteenth of the same July, the cars on which the plaintiff's hay was transported, having been removed, but under whose direction does not appear, to the defendants' wharf, were precipitated into the dock by the breaking down of the wharf, in consequence of its being overloaded with railroad iron. This risk, the plaintiff affirms, was not contemplated by the parties, nor assumed by him, but was the consequence of the gross negligence of the defendants, and therefore they should sustain the loss. Being a bailee without reward, the defendants are bound to slight diligence only, and are not therefore answerable except for gross

neglect: Story on Bailments, sec. 62; Foster v. Essex Bank, 17 Mass. 500 [9 Am. Dec. 168]. The authorities do not concur in a uniform standard by which to determine what constitutes gross negligence in a gratuitous bailee or depositary. Such a bailee, who receives goods to keep *gratis*, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them. He is only answerable for fraud, or that gross neglect which is evidence of fraud: Just. Inst., lib. 3, tit. 15, sec. 3; Coggs v. Bernard, 2 Ld. Raym. 909, 914; Foster v. Essex Bank, *supra*; 2 Kent's Com. 561, 562.

Judge Story, in his work on bailments, section 64, says: "The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual; but it looks to the general conduct and character of a whole class of persons; and so Sir William Jones has intimated on some occasions." He cites Jones on Bailments, 82, 83; Tompkins v. Saltmarsh, 14 Serg. & R. 275; Doorman v. Jenkins, 2 Ad. & El. 256.

Both of the above rules, which on a strict analysis will not be found in any essential point dissimilar, are subject, under some circumstances, to modification. Thus when the bailor or depositor not only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent, in advance, that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have entrusted them with such a depositary, to be kept in such a manner and place. Applying these principles to the case under consideration, and whatever view we may take of the extent of the plaintiff's liability by reason of his special contract, the result can not be doubtful. That it was the expectation of both parties that the hay was to be shipped from the defendants' wharf is very apparent. That wharf was open to the inspection of the world. The plaintiff had the same opportunity to observe its condition as the defendants. The iron by which it was ultimately carried down had been deposited upon it months before. No additional incumbrance appears to have been placed upon the wharf by the defendants after the arrival of the hay before it finally broke down.

In view of all the facts in the case, and independent of the special contract testified to by Mr. Hamlin, we are of opinion that the defendants are not liable. Therefore, according to agreement, a nonsuit must be entered.

CHAPTER IV.

B. OF GRATUITOUS LOANS.

See the cases in §§ 1, 3, 8, 14, 15.

II. OF MUTUAL BENEFIT BAILMENTS.

CHAPTER V.

CLASSIFICATION AND GENERAL PRINCIPLES.

See the cases in §§ 18, 33.

CHAPTER VI.

A. PIGNUS, OR PLEDGE.

21. STEARNS V. MARSH,

4 Denio (N. Y.) 227; 47 Am. D. 248. 1847.

Assumpsit on a note, secured by ten cases of boots deposited with plaintiff. Verdict, under instructions from the court, for the balance due on the note.

By Court, JEWETT, J. The contract between these parties was strictly a pledge of the boots and shoes. At common law, a pledge is defined to be a bailment of personal property, as a security for some debt or engagement: 2 Kent's Com. 577, 5th ed.; Story on Bail., sec. 286. The plaintiff's debt, thus secured, became payable on the eighth day of November, 1837. On the fifteenth of that month, the plaintiffs caused the pledge to be sold at a public sale by an auctioneer in Boston, pursuant to a public notice published in certain newspapers in that city from the second to the fifteenth of November inclusive; but no notice of sale, or to redeem, was at any time given to the defendants. The net proceeds of the sale was one hundred and sixty-six dollars and ninety-seven cents, which the plaintiffs applied on their debt without the assent of the defendants.

The first question made on the argument is, whether the sale thus made was authorized and bound the defendants. On the part of the plaintiffs it was insisted, that the pledge having been made as a security for their debt, which was payable at a future day, the plaintiffs had a right, after a default in payment, to sell the pledge, fairly in the usual course of business, without calling on the defendants to redeem, or giving them notice of the intended sale: and that such sale concluded the defendants. It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale, though in the former it is conceded that there must be such demand and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the

pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the pledgor. The old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale; or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale.

I find no authority countenancing the distinction contended for; but on the contrary, I understand the doctrine to be well settled, that whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated: *Cortelyou v. Lansing*, 2 Cai. Cas. 204; 2 Kent's Com., 5th ed., 581, 582; 4 Id. 138, 139; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303; *Johnson v. Vernon*, 1 Bail. 527; *Perry v. Craig*, 3 Mo. 516; *Parker v. Brancker*, 22 Pick. 40; *De Lisle v. Priestman*, 1 Browne (Pa.), 176; *Story's Com. on Eq.*, sec. 1008; *Story on Bailm.*, sec. 309, 310, 346; *Hart v. Ten Eyck*, 2 Johns. Ch. 100; *Patchin v. Pierce*, 12 Wend. 61; *Garlick v. James*, 12 Johns. 146 [7 Am. Dec. 294]. Nor do I see any reason for such a distinction. In either case the right to redeem equally exists until a sale: the pledgor is equally interested, to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other; both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other; unless indeed the pledgor resorts to a court of equity to quicken a sale. Personal notice to the pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party. And if the pledgor can not be found and notice can not be given to him, judicial proceedings to authorize a sale must be resorted to: 2 *Story's Com. on Eq.*, sec. 1008. Before giving such notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value of it from him, without tendering the debt; because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is to return the pledge, and it would therefore be nugatory to make the tender: *Cortelyou v. Lansing*, *supra*; *Story on Bail.* (2d ed.) 349; *McLean v. Walker*, 10 Johns. 472.

The evidence in this case shows that the plaintiffs, in November, 1837, long prior to the commencement of this suit, tortiously sold the pledge, and thereby put it entirely beyond their power to return it, upon payment of the debt. Where a pledge

is made by a debtor to his creditor to secure his debt, for a certain term, the law requires that the latter shall safely keep it without using it, so as to cause any detriment thereto; and if any detriment happens to it within the term appointed, it may be set off against the debt, according to the damage sustained. And if the pledge is made without mention of any particular term, the creditor may demand his debt at any time. When the debt is paid, the creditor is bound to restore the pledge in the condition he received it, or make satisfaction for any injury that it has received; for it is a rule, that a creditor is to restore the pledge or make satisfaction for it; if not, he is to lose his debt: 1 Reeve's Hist. Eng. L. 161, 162. If the pledgor, in consequence of any default of the pledgee, or of his conversion of the pledge, has by any action recovered the value of the pledge, the debt in that case remains, and is recoverable, unless in such prior action it has been deducted. By the common law the pledgee, in such an action brought for the tort, has a right to have the amount of his debt recouped in the damages: Bac. Abr., Bailment, B; Jarvis v. Rogers, 15 Mass. 389; Story on Bail. (2d ed.) secs. 315, 349.

The plaintiffs were wrong-doers in selling the pledge at the time they did, without notice to redeem or of the sale being given to the defendants; and it is shown that the value of the pledge at the time equaled, if it did not exceed, the debt which it was made to secure. The counsel for the defendants, in effect, offered to recoup their damages arising from the plaintiffs' breach of the contract of pledge, but was not permitted to do so. It is urged by the plaintiffs' counsel, that the defense was not admissible under the pleadings; but I am satisfied that it was unnecessary to plead specially, or to give notice of the matters relied on. The evidence establishes that the plaintiffs had no cause of action, and the defense is fairly covered by the plea of *non assumpsit*: Batterman v. Pierce, 3 Hill, 171; Barber v. Rose, 5 Id. 76; Ives v. Van Epps, 22 Wend. 155. The defendants clearly had an election of remedies against the plaintiffs for the conversion of the pledge. They could maintain *trover* or *assumpsit*, and in the latter action could recover the value under the common counts: Hill v. Perrott, 3 Taunt. 274; Butts v. Collins, 13 Wend. 139-154. If *assumpsit* was maintainable by them, they may, in an action by the plaintiffs, set off the value of the boots and shoes as for such property sold. There is no valid objection on the ground that the damages are unliquidated or uncertain. The case of Butts v. Collins is decisive on that point. There must be a new trial.

New trial granted.

22. HALL V. PAGE,

4 Ga. 428; 48 Am. D. 235. 1848.

Trover by Page for note given in payment for certain buggies, harness and carpets sold by Hall, in part as agent for Page and in part for himself. He took in payment the note in question upon six months' time.

By Court, NESBIT, J. (Omitting other points.) 5. On the day that the goods were delivered to the defendant, the plaintiff received from him two notes, as collateral security, for the payment of the price of them. One of these notes, one hundred and thirty-five dollars in amount, was paid to him. The payment was after this suit was commenced, and subsequent to the service of a process of garnishment upon the plaintiff, sued out at the instance of other creditors of the defendant. Upon the motion for a new trial, it was claimed that the verdict was erroneous, in this; that this sum of one hundred and thirty-five dollars was not allowed as a credit to the defendant. The court, upon this point, ruled: "that by the evidence this sum was held subject to summons of garnishment at the instance of Hall's (the defendant's) creditors. It is very certain that either Hall or his creditors have a right to that money. Both can not have it, and Page (the plaintiff) can not be delayed in his suit until the controversy between Hall and his creditors shall be ended. The jury, therefore, properly refused to abate Page's damages for that sum." The opinion of the court thus expressed, is excepted to. We can not assent to the doctrine that collateral securities, pledged *bona fide* for the payment of a debt without any trust reserved, belong to the pledgor or his creditors. That is to say, that they belong to him or them, in any sense, which will defeat the pledgee's right to them, or which is the same thing, to money raised on them as security for his debt. That right is paramount to the rights of other creditors, and is good against the pledgor himself, until the debt is paid. The pendency of a garnishment makes no difference. The pendency of this suit assumes that the debt is due. If this action can be sustained—if that assumption be true—upon the trial, it was competent for the court to appropriate the money received on the collaterals, to the plaintiff, and of course to credit the defendant. It ought to have been so appropriated. There was no necessity to await an issue on the garnishment. The court, on the trial of this suit, had jurisdiction of the matter. It did, in fact, exercise that jurisdiction by determining that this money belonged to the defendant or his

creditors. If it belonged to the defendant, it was pledged to pay this very debt. The creditors of the defendant had no rights in it, until the pledgee is paid. There could, therefore, be no controversy about it, between the defendant and the creditors, until the debt of the plaintiff is paid. But the debt, by the record, is not paid. The very question is, shall it be now paid, to the extent of the money in hand? The plaintiff is not delayed at all. He is expedited; for a judgment that this money be allowed as a credit to the defendant, is an instantaneous payment to him. An appropriation in this way to the plaintiff would protect him on the trial of the garnishment. Whether appropriated or not, his rights in this money are paramount to those of the garnishing creditors. There is nothing in this record, it may be proper to remark, which impeaches the fairness of this pledge. It is not obnoxious to the act of 1818, or any other law of the state. Upon the traverse of the plaintiff's answer to the garnishment (he answering truly, as this record discloses the facts), I apprehend that the garnishing creditors could not get a judgment against the plaintiff, until they had first proven that this debt was paid. In that event, it is true, these collaterals and this money would belong to the defendant or his creditors. *But only in that event.*

We examine this doctrine a little. We say that the deposit of these notes in the hands of the plaintiff, as collateral security for this debt, is a pawn or pledge. A pledge is a bailment of personal property as security for some debt or engagement: Story on Bail., sec. 286. Ordinarily, goods and chattels are the subject of pledges; but money, debts, negotiable instruments, choses in action, etc., may by the common law be delivered in pledge: Kemp v. Westbrook, 1 Ves. sen. 278; Lockwood v. Ewer, 9 Mod. 278; Seamer v. Bingham, 3 Atk. 56; McLean v. Walker, 10 Johns. 471, 475; Roberts v. Wyatt, 2 Taunt. 268; Jarvis v. Rogers, 13 Mass. 105; 15 Id. 389; Garlick v. James, 12 Johns. 146 [7 Am. Dec. 274]; Story on Bail., sec. 290.

What are the rights of the pledgee in the thing pledged generally? In virtue of the pawn, he acquires a special property in the thing, and is entitled to the exclusive possession of it, during the time, and for the objects for which it is pledged: Story on Bail., sec. 303; Jones on Bail., sec. 80; Cortelyou v. Lansing, 2 Cai. Cas. 202; Garlick v. James, 12 Johns. 146 [7 Am. Dec. 294]; Ratcliff v. Davis, 1 Bulst. 29; Cro. Jac. 244; Coggs v. Bernard, 2 Ld. Raym. 909, 916; 2 Kent's Com. 578, 585, 4th ed.; 1 Bell's Com. 200, 4th ed.; Whitaker v. Sumner, 20 Pick. 399, 405; Jones v. Baldwin, 12 Id. 316. The right of possession is exclusive—that is, it is good against all the world,

for the purpose for which it is pledged—in this case, that purpose is the payment of a debt. For that purpose, the right to the thing is perfect. It yields to no other right which did not attach upon it, in the shape of a lien, prior pledge, or some claim existing prior to the pledge, and good in law. It is perfect against the pledgor. For if he wrongfully get possession, a suit in favor of the pawnee will lie against him for the thing, or for damages. He can bring an action for it, also against a stranger, or an action against the stranger for damages: *Wilbraham v. Snow*, 2 Saund. 47, note; *Woodruff v. Halsey*, 8 Pick. 333 [19 Am. Dec. 329]; 2 Kent's Com. 585, 4th ed.; Story on Bail., sec. 303; *Lyle v. Barker*, 5 Binn. 457.

He has also a right to sell the pledge where there has been a default in the pledgor; if there is no stipulated time when the debt shall be paid, the pawnee may sell upon demand and notice: Story on Bail., sec. 308; 2 Kent's Com. 581, 582, 4th ed.; 2 Story's Eq. Jur., secs. 1031-1033; Holt's N. P. 385. He may file a bill in equity for foreclosure and sale, or upon demand and notice proceed to sell, *ex mero motu*, at his election; *Kemp v. Westbrook*, 1 Ves. sen. 278; *Garlick v. James*, 12 Johns. 146 [7 Am. Dec. 249]; 2 Story's Eq. Jur., secs. 1031-1033; *Patchin v. Pierce*, 12 Wend. 61; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; Story on Bail., sec. 310. These are the principal rights of the pawnee. What, specially, are the rights of the pawnee of negotiable securities? He may recover and receive the money due thereon; he may bring suit upon them in his own name: *Id.* 321; *Bowman v. Wood*, 15 Mass. 534; *Garlick v. James*, 12 Johns. 146 [7 Am. Dec. 294]. He may sell them, and if he sells to a *bona fide* purchaser, the latter acquires an absolute property, if he buys without notice: Story on Bail., sec. 322; 1 Story's Eq. Jur., secs. 434, 435; Story on Ag., sec. 126-130; *Jarvis v. Rogers*, 13 Mass. 105; 15 *Id.* 389; *Bowman v. Wood*, *Id.* 534; *Garlick v. James*, 12 Johns. 146 [7 Am. Dec. 294]; *Collins v. Martin*, 1 Bos. & Pul. 648; *Peacock v. Rhodes*, Doug. 633; *Seamer v. Bingham*, 3 Atk. 56; *Miller v. Race*, 1 Burr. 452; 1 Bell's Com., sec. 412, 4th ed.; *Matthews v. Poythress*, 4 Ga. 287.

It is not necessary to pursue this subject in detail. The pawnee is entitled to receive the money due on his collateral securities, and to hold it against his pawner and all the world, until he is paid. When a pledge is made for the benefit of the pledgee and a third person, who is also a creditor, and the fund raised is insufficient to pay both, the pledgee, being a creditor in possession, is entitled to preference. According to the idea

of the Roman law, "*In pari causa possessor potior haberi debet*:" Marshall v. Byrant, 12 Mass. 321; Story on Bail., sec. 313. If this is true as to other creditors, when there is a stipulation in their behalf, *a fortiori*, it is true as to creditors generally, as to whom there is no stipulation. The rights of the holder of negotiable instruments as collateral securities, in them, were considered by this court in the case of Bond v. The Central Bank, 2 Ga. 106, and in Gibson v. Conner, 3 Id. 52, 53. In the latter case we say: "The transferror parts with, and the transferee acquires, the legal title to the negotiable paper thus transferred—the latter may sue on it in his own name, and although the original debt is not extinguished, the creditor has the right to apply the proceeds of the securities, when realized, to its extinction—nay, he is bound to do it, and whatever he does realize on them is a payment *pro tanto*." If it be the right of the pledgee to apply money collected on the securities, it is the right of the pledgor to consider money thus in hand as a payment. If such is the law of the case, he (the defendant) is entitled, the case being made, to have it so declared, and to have a credit on the original debt. This the court ought to do, if for no other reason than to avoid litigation. As before stated, the court had jurisdiction, in this case, of this subject-matter, and we think it erred in not ruling that this money was by law to be appropriated to the plaintiff's debt, and as a consequence, that the defendant was entitled to a credit for the amount of it.

Upon these grounds we remand the case.

23. AMERICAN PIG IRON STORAGE WARRANT CO. V. GERMAN,

126 Ala. 194; 28 So. R. 603; 85 Am. St. R. 21. 1899.

SHARP, J. . . . The litigation originated under circumstances substantially as follows: The Alabama Iron and Steel Company, a domestic corporation, was for several years engaged in the manufacture and sale of charcoal pig iron. The appellant, the American Pig Iron Storage Warrant Company, a corporation having its principal office in New York city, did a warehouse business which consisted mainly in the storage of pig iron. Its yard, No. 38, was located near the furnace of the Alabama Iron and Steel Company (which we will refer to hereafter as the furnace company), near Briarfield, Alabama, and was divided into three sections, designated, respectively, as "A," "B,"

and "C." Under its regulations iron, when stored in it, was placed in separate piles, each containing one hundred tons, and marked with letters to identify its location, and with figures to designate its grade. For each of these hundred ton lots the local yardmaster gave to the depositor his certificate, and upon that certificate, when forwarded to the New York office, the storage company issued to whom the furnace company might direct its several warrants for each of such lots, which warrants described the iron covered by it, and stipulated that "this company has received into its storage yard, located as above, and entered in its storage-books in New York in the name and subject to the order of (name of holder) one hundred tons of 2,240 pounds each of pig iron of the brand, grade and weight represented by this warrant, which will be delivered free on board cars in the yard above named, only on surrender of this warrant at the New York office, properly endorsed and witnessed, with payment of charges as noted below." The storage yard system was availed of by the furnace company for the purpose of borrowing money on the security of its unmarketed iron, the warrants for which could be conveniently used as evidence of a pledge of iron to secure its notes. In some instances of borrowing the storage company and its yard were not resorted to, and the iron was delivered elsewhere in pledge to the lender independently of the storage company. Besides other investors who from time to time made loans to the furnace company upon the security of storage warrants was the storage company itself. In this way it became the pledgee of its own warrants, representing about two thousand one hundred tons of iron in its yard 38. . . .

Joseph Verchot brought this suit, and thereafter, he having died, it was revived in the name of his executrix. It seeks to enforce a pledge of seven hundred tons of iron alleged to have been made to him by the furnace company as security for money loaned on its seven notes each reciting a pledge of one hundred tons of designated iron, and further reciting that "any excess in the value of said collaterals or surplus from the sale thereof beyond the amount due hereon shall be applicable upon any other note or claim held by the holder hereof against us now due, or to become due, or that may hereafter be contracted." It is alleged in substance that after the iron was so delivered in pledge it was, under the direction of the furnace company's president, wrongfully removed into the storage warrant yard, where interests in it were claimed by other parties defendant.

The demurrer to the bill was properly overruled. Verchot, not having possession of the iron, could not pursue the ordinary

way of enforcing his security by a sale of the iron, and his sale, if it could be made, would be embarrassed by the conflicting claims upon it. In such case equity has jurisdiction to determine the rights of rival claimants and to enforce the pledge by judicial sale: 3 Pomeroy's Equity Jurisprudence, sec. 1231; 18 Am. & Eng. Ency. of Law, 674; Sharp v. National Bank, 87 Ala. 644, 7 South. 106; Freeman v. Freeman, 17 N. J. Eq. 44.

There was nothing in the pendency of other creditors' bills to preclude him from proceeding by original bill instead of by intervention under those bills: Alabama Iron etc. Co. v. McKeever, 112 Ala. 134, 20 South. 84.

The statutes requiring chattel mortgages to be in writing and authorizing their registration have no application to a pledge. A pledge differs from a mortgage in that the pledgee must have possession and the pledgor the legal title of the property, while a mortgage passes the title to the mortgagee and may allow possession to remain in the mortgagor: Jones on Pledges, secs. 4, 7; Geilfuss v. Corrigan, 95 Wis. 651, 60 Am. St. Rep. 143, 70 N. W. 306. Notice to the public of the pledgee's interest in the property is sufficiently given by the possession, which must reside in the pledgee. Such possession, however, to be effective either for notice or to give validity at law to the pledge, must be complete, unequivocal, and exclusive of the pledgor's possession in his own right: Jones on Pledges, sec. 40; Casey v. Cavaroc, 96 U. S. 467; First Nat. Bank v. Caperton, 74 Miss. 857, 60 Am. St. Rep. 540, 22 South. 60. As bearing on the question what constitutes such possession, the reported cases are numerous; but those which can be relied on as express authority are few, since each case is determined upon its peculiar facts.

In this case it is clearly proven that under the agreement of pledge between the furnace company, acting by its president and Verchot, a particular spot of ground belonging to that company and located apart from its own iron yards was tendered by the president and accepted by Verchot for his use, and that a quantity of iron was placed thereon, piled in one hundred ton lots and marked with paint with Verchot's initials. There is nothing to show that any power was reserved or allowed to the furnace company or its officers or employees either to repledge, sell, use, or have charge of the iron after it was so placed.

It was not essential for the delivery to be made at the time of the contract, and the pledge took effect upon subsequent delivery made in performance of the contract: Nobles v. Chris-

tian-Craft Grocery Co., 113 Ala. 220, 20 South. 961; Denis on Contracts of Pledge, sec. 136. Considering the character of the property involved, its delivery must be taken as vesting complete possession in Verchot, thereby validating the pledge. The cases of Allen v. Smith, 10 Mass. 308, and Sumner v. Hamlet, 12 Pick. 76, may be referred to as analogous in principle.

It is proven that T. J. Peter, president of the furnace company, had active charge of its affairs, and that by his direction iron was taken from the Verchot yard and placed in the storage company's yard, and there is nothing to show that Verchot ever authorized or ratified such removal excepting a statement attributed to T. J. Peter, which is hearsay and for that reason incompetent as evidence. There is, however, evidence tending to show that, contrary to the storage company's printed rules, its yardmaster had, in some instances, given certificates upon which warrants were issued to, and pledged by, the furnace company representing deposits of iron in the storage yard before they were actually made. The necessity for supplying the shortage thus created, for which E. T. Peter, the yardmaster, might have been held responsible to the storage company, furnishes a probable motive for so using the iron in controversy. It may be that Peter expected that Verchot would ratify such removal upon restitution made to him from iron to be manufactured, but there is no proof of such ratification. On the contrary, there is evidence tending to show that on being informed of the removal he objected and held to his original contract.

As to the quantity of iron delivered to Verchot on the yard assigned to him, and likewise as to the quantity thence removed into the storage company's yard, the evidence is not clear. Those matters being referred to the register, he ascertained that the entire seven hundred tons were so delivered and removed. The testimony is not in accord as to the quantity removed, neither does it accord as to the time of removal, and the weighing-books in evidence are not shown to have been accurately kept. The testimony can be best harmonized upon the supposition that removals in different quantities occurred at different dates, and that all of such acts of removal were not known to each witness. So viewed the evidence supports the register's findings.

The demurrers to the intervening petitions show no tenable grounds. Such petitions are not required to conform to all the technical rules applicable to pleading as between the principal parties. When filed by leave of court other parties in

interest are entitled to notice and an opportunity to defend, but the petition need not name them as defendants, and it needs no formal prayer for process.

Pfaff's petition presents a case for the most part similar to that of Verchot. He claims as the holder of notes containing agreements for pledges of iron as collateral security transferred to him by C. S. Plumb, who is alleged to have made loans thereon to the furnace company, aggregating five thousand dollars. There is evidence amply supporting the petition and showing that, pursuant to the contracts, iron was set apart to Mrs. Plumb by being placed upon a spot of ground leased to her by the furnace company for that purpose, and was there marked with initial of her name. There is no evidence of any right reserved or allowed to the furnace company, or anyone connected with it, to thereafter use or exercise any control over the iron. This delivery vested Mrs. Plumb with possession, and in that respect fully executed the pledge contract.

It was ascertained by the register upon a reference that three hundred tons of iron were by direction of the furnace company's president removed from the Plumb yard into the storage company's yard and that two hundred tons of same remained on that yard, the warrants describing same being held by the storage company, and that a warrant describing the other one hundred tons had been issued to an innocent holder for value, and that this last-mentioned one hundred tons had been removed from the state, but that there had been another one hundred tons substituted and held in lieu of it in the storage yard.

Though a pledgee does not acquire the legal title to the pledged property, and though relinquishment of his possession will ordinarily defeat the pledge, yet the pledgor cannot accomplish such defeat by wrongfully retaking possession: *Way v. Davidson*, 12 Gray, 465, 74 Am. Dec. 604; *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245. Verchot and Mrs. Plumb, in whose place Pfaff now stands, being without fault, might have recovered possession from the furnace company when the iron was taken by it or its representatives from their respective yards; and the same right of action lay against the storage company after it was held in its yard. Neither the storage company nor its warrant holders, either with or without notice of the pledge, could acquire any greater interest than their transferrer, the furnace company, had, which was only to have the property after satisfaction of the debts it was pledged to secure: *Burton v. Curryea*, 40 Ill. 320, 89 Am. Dec. 350; *Solomon v. Bushnell*, 11 Or. 277, 50 Am. Rep. 475, 3 Pac. 677. The statute (Code,

sec. 4222) regulating the issuance of warehouse receipts was not intended to confer rights upon their holders prejudicial to one whose property is stored without authority: *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 12 South. 568.

(Omitting other matters.) Judgment affirmed at cost of appellant storage company.

24. GEILFUSS V. CORRIGAN,

95 Wis. 651; 70 N. W. R. 306; 60 Am. St. R. 143. 1897.

Action to recover \$178,908.00 for pig iron taken under a judgment in favor of the receiver of Corrigan, Ives & Co., who had furnished the furnace company the iron ore from which the pig iron was made. Plaintiff was assignee of the Commercial Bank of Milwaukee, which had advanced the furnace company large sums on the security of "storage warrants." Judgment for plaintiff.

WINSLOW, J. The so-called storage warrants were not warehouse receipts, either under the laws of Pennsylvania or of Wisconsin. In order to be such, they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation: 1 *Brightly's Purdon's Digest*, 12th ed., p. 165, sec. 1; *Bucher v. Commonwealth*, 103 Pa. St. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence: *Shepardson v. Cary*, 29 Wis. 34. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the certificates been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and indorsement of the receipts to it by the Buffalo Mining Company: *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267; 1 *Brightly's Purdon's Digest*, 12th ed., p. 165. sec. 1. But we may dismiss this question, because they were not such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the

iron named in them, not only because they are not chattel mortgages in legal effect, but also because by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage is only valid as to third persons when filed in the proper office, and there is no claim of any filing here: 1 Brightly's Purdon's Digest, 12th ed., p. 665, secs. 200-214.

Thus, at the outset of the case, it appears that the plaintiff had no interest in or lien upon the iron in question, as indorsee of a warehouse receipt nor as a chattel mortgagee. Nor can it be claimed that the plaintiff actually bought or obtained legal title to the iron. These possible claims being thus eliminated, we know of no other claim which the plaintiff can make, unless it be a claim as pledgee of the iron as collateral to the debts of the Buffalo Mining Company and of Schlesinger; and this, in fact, is the claim made in the complaint, and the only claim which the evidence tends to justify. It becomes necessary, then, to consider the question whether the evidence shows a valid pledge. The principles of law governing a pledge of personal property are simple and familiar. To constitute a valid pledge there must be transfer of possession to the pledgee, actual or constructive: *Seymour v. Colburn*, 43 Wis. 67. A pledge differs from a mortgage in this important respect, namely, that the legal title to the property pledged remains in the pledgor, subject to the pledgee's lien for his debt, while a mortgage passes the legal title to the mortgagee. In the case of a pledge, a lien is created, to the existence of which possession is absolutely necessary; in the case of a mortgage, title passes, subject to be revested by performance of a condition subsequent: *Jones on Pledges*, secs. 4, 7; *Thompson v. Dolliver*, 132 Mass. 103. Therefore, if the bank had any interest in the iron at the time of its seizure, it was that of a lien thereon, by way of a pledge.

In considering the question of whether it had such a lien which was valid as against the creditors of the furnace company, a brief recapitulation of the essential facts will be useful. Ferdinand Schlesinger owned two corporations, one, a mining corporation, engaged in mining ore in Michigan; the other, a furnace company, engaged in smelting ore in Pennsylvania. These corporations were nominally furnished with full complements of officers, but in fact the business of each was directed and controlled by Schlesinger as though it were his own. The furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania, and was largely indebted to Corrigan, Ives & Co., of whom it purchased its iron. It refused to give Corrigan, Ives & Co. security on the iron, on the ground

that such a course would injure its credit. In order to raise money for the furnace company, Schlesinger caused the furnace company to issue apparent storage receipts to the mining company, without consideration, and without agreement to purchase, and without selection or delivery of the property, either actual or constructive, unless the handing over of the receipts be delivery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sale of the iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. What was done with all the money so borrowed does not appear. The original purpose seems to have been, as said in respondent's brief, to raise money for the furnace company, and the evidence shows the fact that the mining company was almost daily remitting money in large amounts to the furnace company, as well as the fact that the furnace company was frequently remitting to the mining company. None of the remittances were made in payment of the iron certificates, nor were they ever intended to be applied thereon. The fact seems to be that each enterprise was bolstering up the other as occasion required, or, rather, that Mr. Schlesinger was using the property and credit of his apparently separate concerns indiscriminately, to obtain money as it was needed. It seems probable that much of the money borrowed on the notes of the mining company secured by the receipts in question was forwarded to the furnace company.

The court found that the bank took the certificates innocently, without knowledge of any defect. We cannot probably disturb this finding, because it is based on the affirmative evidence of the cashier who made the loans; but, in view of the facts proven on cross-examination of the cashier himself, this finding seems to be a considerable tax on the credulity. The facts are, in brief, that the cashier was well acquainted with Mr. Schlesinger, so much so that in 1892 Schlesinger put in his hands one share of stock in the Buffalo Mining Company, in order that he might become a director of the company, and he was thereupon made a director and secretary of the company, and remained such until April, 1893, when he resigned, and returned his share of stock. This was after the loans on the credit of the receipts had begun to be made. Notwithstanding his high official position in the mining company, he testifies that he "knew nothing of its business," except that it was engaged in mining. We think he could hardly have failed to dis-

cover the manner in which Mr. Schlesinger conducted the business of his nominal corporations. However this may be, he knew, as he testifies, that the mining company was engaged in mining ore, and not in buying or selling pig iron. He knew "something" about the furnace company; knew where it was doing business; knew Mr. Hirschfeld, the nominal president; discounted some of the furnace company's paper; obtained general information about it by inquiries through commercial agencies at the time of the pledging of the receipts. In view of all these facts which were within his knowledge, and the facts which he might have ascertained without difficulty by very little inquiry, it seems almost an impeachment of his intelligence to say that he received the receipts in ignorance of any defect or infirmity in them; but we suppose we are bound by the finding, and we shall proceed on that basis.

It is very apparent that, had the certificates remained in the hands of the mining company, they would have constituted no obstacle to creditors of the furnace company in the collection of their debts. They were subject to nearly, if not quite, all the objections which render transfers void as to creditors. They were absolutely false in fact. There was no change of possession of the iron; no payment nor agreement to pay for it; no intention to pass title. They were the merest shams. There was, in effect, an agreement that the furnace company should remain the apparent owner, with the right to sell and receive and dispose of the proceeds of sales, and that it should have the right to call back certificates whenever it needed them for this purpose; and it was further expected that, when the need for borrowing money was over, the certificates should all be returned. The scheme was certainly a brilliant one. If successful, it created a shifting title or interest, which readjusted itself from day to day as the stock changed, automatically attaching to each new pig of iron as it emerged glowing from the furnace, and with equal facility detaching itself from each pig that was sold as it was loaded on the car for transportation to the vendee. Certainly, if such a scheme could be successful, the inventor should take high rank among a certain class of financiers; and the laws which have been supposed to prevent secret transfers and conveyances in fraud of creditors must be at once revised, or they will pass into the dim limbo of unexecuted and worn-out legislation.

It is seriously and ably argued that the scheme has been successful; that the original transaction has been purged of all objections by the intervention of the innocent third person, in the

shape of the plaintiff bank; and thus that the shifting and self-adjusting, but void, title of the mining company has been turned into an equally shifting and delusive, but good, lien for the benefit of the bank—a lien which is secret and invisible to creditors, but entirely visible and very real to the plaintiff. As before said in this opinion, the only interest which the plaintiff claims or can claim in the iron in question is that of a lien thereon as pledgee; and, in order to make a valid pledge, there must have been either actual or constructive delivery of the property pledged. Bona fides does not avail the pledgee in the absence of delivery and possession, either actual or constructive. There was confessedly no actual delivery here, and the only thing that can be claimed to be a symbolical or constructive delivery is the indorsement and delivery of the false receipts. Hence, the question becomes whether the delivery of the receipts under the circumstances is a constructive delivery of so much iron. Had they been in fact warehouse receipts, the transfer and indorsement thereof by way of pledge would have operated as a sufficient constructive delivery of the property, both by the common law and by the statute: Rev. Stats., sec. 4194; *Shepardson v. Cary*, 29 Wis. 34; *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267. Bills of lading and railroad receipts are placed by the statutes of both states on the same footing: See statutes of Pennsylvania before cited in this opinion. The reasons for this rule are very apparent. In such cases, the property itself is in the hands of a third person or corporation, instead of in the possession of the vendor or pledgor. Consequently, it does not furnish any false basis of credit, nor is any creditor deceived, because it is well understood that goods in the hands of warehousemen or carriers are or may be the property of others, and, by the long usage of trade, subject to just this mode of transfer. No such considerations, however, apply in the case of goods in the possession of the vendor or pledgor, or of some third person who is not a warehouseman or wharfinger, and we know of no rule which makes the mere delivery of a receipt a constructive delivery of the property in pledge in such a case. In *Shepardson v. Cary*, 29 Wis. 34 (which was an action in equity to enforce a pledge of personal property as collateral, alleged to have been made by means of the transfer of a warehouse receipt), Dixon, C. J., says: "To uphold the receipt as a proper warehouse document transferring the title to the property, and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business, and in the usual course of

trade." There are numerous examples of constructive delivery in the books, but none, we think, which holds that the facts here constitute such delivery. Constructive or symbolical delivery is permitted because of the difficulty or impossibility, in some cases, of actual delivery. Thus, where the goods are very bulky, as logs in a boom, delivery may be made by pointing them out to the pledgee; or, where they are goods in a warehouse, by a delivery of the keys; or, where a savings bank deposit is to be pledged, it may be done by delivery of the pass-book; *Jewett v. Warren*, 12 Mass. 300; 7 Am. Dec. 74; *Jones on Pledges*, secs. 36, 37; *Boynton v. Payrow*, 67 Me. 587. So, also, where goods are in possession of a third person, and the pledgor gives an order on the custodian to hold the goods for the pledgee, which is brought to the knowledge of the custodian, it seems that this would be a sufficient delivery and change of possession: *Whitaker v. Sumner*, 20 Pick. 399; *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479. In all these cases it will be readily seen that the property is placed beyond the control of the pledgor, and is not being used to maintain an appearance of wealth by either the pledgor or others with the consent of the pledgee.

In the present case there is no such element. The pledgee never saw or attempted to see the iron described in the certificates, and made no inquiries concerning it. It never notified the furnace company that it held any certificates in pledge, or claimed any interest in any iron in its possession. It tacitly allowed the furnace company to go on in its business for months, selling out the very iron nominally covered by the certificates, and replacing it with other iron, and collecting and using the proceeds of its sales. There can be no constructive or symbolical delivery and continuance of possession logically claimed where such a state of facts appears. Conceding that the title to the iron was in the mining company, the furnace company was the custodian, and the custodian received no notice of pledge, made no agreement to hold for the benefit of the pledgee, but went on in business, selling the property, and substituting other property in its place, with no one to hinder or make it afraid. Apparently the owner of more than twenty thousand tons of iron, it was (if plaintiff's theory is correct) really not the owner of it in case a creditor appeared with an execution. It was held in *Casey v. Cavaroc*, 96 U. S. 467, that where property alleged to have been pledged has at all times been in the actual possession of the pledgor, with authority to dispose of it and substitute another article of equal value in its place, there exists no pledge as against third persons. No reason is perceived why this is not

wholesome doctrine, nor why it does not apply with equal force to possession by a third person, with power of sale and substitution, as in the present case. Our conclusion is, that as against third persons, the bank never perfected its pledge by obtaining possession, either actual or constructive, of the iron named in the certificates, and hence that it cannot maintain this action.

. . . By the Court. Judgment reversed, and action remanded with directions to dismiss the plaintiff's complaint.

25. WILSON V. LITTLE,

2 N. Y. (2 Comstock) 443; 51 Am. D. 307. 1849.

Trover for the conversion of railroad stock. Judgment for plaintiff.

By Court, RUGGLES, J. This was an action for wrongfully selling fifty shares of Erie railroad stock, which the defendants, Little & Co. had received in security for a loan of two thousand dollars made by them to Wilson, through the agency of R. L. Cutting, a broker. The contract in writing was in these words:

“\$2,000.

NEW YORK, Dec. 20, 1845.

“I promise to pay Jacob Little or order two thousand dollars, for value received, with interest at the rate of seven per cent. per annum, *having deposited with them as collateral security*, with authority to sell the same at the broker's board, or at public auction, or at private sale, at option, on the non-performance of this promise, without notice on fifty Erie.

“R. L. CUTTING.”

The stock in fact belonged to the plaintiff Wilson, but stood in Cutting's name on the books of the New York & Erie Railroad Company. It was of that kind known as consolidated capital stock. Cutting negotiated the loan as the plaintiff's broker. On the same day Cutting made a transfer of the stock on the books of the company in the words following:

“N. Y. & Erie Co.

“For value received, I hereby transfer unto Jacob Little & Co. all my right, title, and interest in fifty shares of the consolidated capital stock of the New York & Erie Railroad Company.

“New York, Dec. 20, 1845.

R. L. CUTTING.”

It is contended, on the part of the defendants, that the transaction was a mortgage, and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellants, and was only redeemable in equity. If this be true, the supreme court and the court for the correction of errors must have rendered their judgments in the case of *Allen v. Dykers*, 3 Hill (N. Y.), 593, and *Dykers v. Allen*, 7 Id. 498 [42 Am. Dec. 87], upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, two hundred and fifty shares of the stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive: See *Brown v. Bement*, 8 Johns. 98. If there had been good ground for saying, in *Allen v. Dykers*, that the stock was mortgaged and not pledged, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledgor; and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee can not otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which can not be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may

not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge: *Story on Bail*, secs. 290, 297. The capital stock of a corporate company is not capable of manual delivery. The scrip of certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws: 1 R. S. 600, sec. 1. It is so in the case of the New York & Erie Railroad Company: *Laws of 1832*, c. 224, sec. 18. The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed, it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. *Reeves v. Capper*, 5 Bing. N. C. 136, was a case in which the debtor "made over" to the creditor "as his property" a chronometer, until a debt of fifty pounds should be repaid. It was held to be a valid pledge.

In the present case the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of two thousand dollars, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper.

The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the

thing pledged on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock.

In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee can not sell the pledge without a previous demand of payment, although the debt is technically due, immediately: *Story on Bail.*, sec. 308; *Stearns v. Marsh*, 4 Denio, 227 [47 Am. Dec. 248].

Payment of the note in this case was not demanded until the third of January, 1846. Previous to that time, and about the twenty-fourth of December, 1845, the defendants had sold the whole or the greater part of the fifty shares of consolidated stock pledged to them by the plaintiff, and were therefore not in condition to fulfill the contract on their part by restoring the pledge. Nor were they able nor did they offer to restore the same kind of stock, or stock of the same value as that which had been pledged in behalf of the plaintiff. On the third of January, when the defendants offered to deliver the converted stock, which was of a different kind and value, the plaintiff's broker was willing to receive any stock of the same description as that which had been pledged; but no stock of that kind was offered by the defendants. There was at that time a material difference in the market price between the consolidated and the converted stock of the company, the former selling at eighty-five dollars, and the latter at fifty-five dollars, per share. The pledge of the fifty shares of consolidated stock, therefore, could not be restored or made good to the plaintiff by assigning to him the same number of shares of converted stock. The defendants were bound to restore the identical stock pledged. The sale of it by the defendants before payment demanded was therefore wrongful, and the evidence sustains the third count in the plaintiff's declaration. The defendants having voluntarily put

it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was therefore unnecessary: *Allen v. Dykers*, 3 Hill (N. Y.), 596; *Dykers v. Allen*, 7 Id. 498 [42 Am. Dec. 87].

The remaining question is as to the rule of damages. The stock was disposed of by the defendants as early as the twenty-fourth of December, when its market price was about sixty-eight dollars the share. The defendant did not, however, distinctly inform the plaintiff then or afterwards that he had sold it, although he said he "had not got it," and gave that as a reason why he did not then transfer it, promising at the same time, that he would make the transfer as soon as the stock came in. The plaintiff, to accommodate the defendant, agreed to wait until the following day, when the transfer was not made, the defendant again promising to make it shortly. The plaintiff's broker reminded the defendant of the stock frequently, and on the thirtieth of December, formally notified him that he wanted to pay the loan and get back the stock, insisting that there should be no more delay, and that if it was not returned, he was directed by the party for whom he was acting to buy fifty shares at the board and charge it to the defendants. The defendant then said the stock should be returned the next day, but failed to return it; and it was not until the second of January that the defendant ceased to hold out the expectation of restoring the stock, or stock of the same kind and of equivalent value. On that day and on the third of January, the consolidated stock sold at eighty-five dollars the share.

The defendants insist that they are chargeable only with the value of the pledge at the time it was wrongfully converted by them to their own use on or before the twenty-fourth of December, and not with its increased value at any subsequent period. The court below, in making up the verdict, estimated the stock at eighty-four dollars the share. In actions for the wrongful conversion of personal property, it has in some cases been held that the value of the property is to be estimated according to its price at the time of the conversion, and in others that the plaintiff is entitled to damages according to its value at any time between the time of the conversion and the day of the trial: *Bank of Buffalo v. Kortright*, 22 Wend. 348, 366. It is unnecessary in this case to settle the general rule. The ground on which the defendants insist that the damages must be estimated according to the price of the stock on the twenty-fourth of December, is that the plaintiff, on learning that the defendants had sold it, might then have gone into the market and pur-

chased it at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendants to restore the stock. Although the plaintiff was strictly entitled to a retransfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendants at their request for the fulfillment of their obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendants, and having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged when the defendant finally failed in his promises to restore it.

Judgment affirmed.

26. MASONIC SAVINGS BANK V. BANGS'S ADMINISTRATOR,

84 Ky. 135; 4 Am. St. R. 197. 1886.

Petition by administrator of estate of intestate, who died insolvent.

PRYOR, J. John B. Bangs, in the month of June, 1884, borrowed of the Masonic Savings Bank the sum of ten thousand dollars, for which he executed his note payable in six months, with interest from date, and to secure its payment he pledged as collateral security three hundred shares of the stock of the New Galt House Company. The nature of the pledge was indorsed on the back of the note, and is as follows: "As security for the payment of the within note, I have deposited with the Masonic Savings Bank three hundred shares of the capital stock of the New Galt House Company, and authorize the said bank to sell the above-described collaterals, and pass a good title thereto to the purchaser, if the within note is not paid at maturity, reserving the right to be notified in writing twenty days previous to the date and place of the contemplated sale."

Bangs, the obligor in the note, died intestate in August, 1884, and the appellee, W. C. Kendrick, administered on his

estate, and in order to a settlement with creditors, filed a petition in the Louisville chancery court, to which the appellant (Masonic Savings Bank) was made a defendant. The estate of Bangs was not only involved, but utterly insolvent.

The Masonic Savings Bank, being a large creditor of the estate, filed an answer and counterclaim, setting forth its various demands, and among them the note for ten thousand dollars. A judgment was asked by the bank for the sale of the stock pledged to secure the payment of that note. The administrator and the bank consented by an agreed order that the bank should sell the stock, subject to the rights of the parties in interest.

The stock was sold by the bank, and realized, after the payment of all costs, the sum of \$13,495.10. This sum satisfied the note, and left a surplus of \$3,536.45, and the manner in which this surplus is to be distributed is the question presented on the appeal.

The bank, holding many other large claims against the estate, asserts its right to apply this surplus to their payment, insisting that by the law merchant it has a lien over other creditors, and if not, having possession of the fund, its right to a set-off against the claim of the administrator can not be denied.

We find no decision by this court determining the question involved; but the right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books on the subject of banks and banking, and sustained by an unbroken line of American decisions. So when the depositor is indebted to the bank, his funds in the bank may be applied to the payment of the debt at its maturity, and a failure of the bank to make such an application has been held to discharge the indorser or sureties.

The right to a set-off would also exist against the administrator or representative of the depositor attempting to recover the deposit after his death: Morse on Banking, 34-36.

This doctrine as to the general lien of a bank, or its right to a set-off, does not control the question involved in this case.

It is equally as well settled that when the deposit is made for a special purpose, with the knowledge and undertaking of the bank, that purpose must be carried out; or when the pledge is specific to secure a particular debt, the lien only applies to the debt intended to be secured by it. "A security given for a contemporaneous advance of one thousand pounds by the banker was held not to be applicable against an indebtedness

of five hundred pounds afterwards arising on the ordinary running account": Morse on Banking, 36.

In this case the intestate deposited with the bank three hundred shares of the New Galt House stock to secure the payment of the note for ten thousand dollars. The title to the stock was in the intestate, subject to this pledge, and the bank had no right to sell more of the stock than would satisfy the debt it was given to secure. If two hundred shares had satisfied the debt, the intestate, if living, could have maintained an action against the bank for the remaining one hundred shares. The debt having been paid, the pledgor or owner would have been entitled to the immediate possession of the stock remaining unsold.

The administrator of Bangs consented that the whole of this stock might be sold by the bank, and when sold, the special pledge having been satisfied, the surplus fund arising from the sale passed to the administrator. It was the property of the estate, and its conversion into money did not alter the rights of the parties. If the appellee, as the administrator, had paid off the ten-thousand dollar note, the whole of the stock would have belonged to the estate, and no lien could have been asserted against the administrator so as to have prevented a distribution among the general creditors.

The special agreement with reference to the particular debt repels the inference that it was pledged for any and all debts that might thereafter be owing the bank by the intestate. In 3 Parsons on Contracts, 264, 265, the lien of the banker is thus stated: "When a negotiable note is indorsed to a banker by the payee as collateral security for one only of several demands for which he is liable, the banker has no lien on such note as security on any other demand against the indorser."

Kent in his Commentaries states the rule: "The pawnee will not be allowed to retain the pledge for any other debt than that for which it was made, even though the holder be a banker": 2 Kent's Com. 775.

In Duncan v. Brennan, 83 N. Y. 487, it was held that personal property pledged for a particular loan, can not, in the absence of a special agreement, be held by the pledgee for any other advance; and in that case it was also said that "the general lien which bankers have upon bills, notes, and other securities deposited with them for a balance due on general account, can not exist where the pledge of property is for a specific sum, and not a general pledge."

In the case of Neponset Bank v. Leland, 5 Met. 259, it was

adjudged that "where a negotiable note is indorsed to a bank by the payee as collateral security for only one of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser."

In the case of *Wyckoff v. Anthony*, 90 N. Y. 442, the bonds in controversy were pledged by the plaintiff as collateral security for a note of eight thousand dollars. The plaintiff tendered the firm the amount of the debt and interest, and demanded the securities. The defendants refused to deliver them unless the plaintiff would pay another claim of the defendants against the plaintiff, for which the bonds had not been specifically pledged.

The plaintiff then brought his action for the value of the bonds, alleging their conversion by the defendants. It was held that "where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance, or for the payment of other claims," and a recovery was permitted.

We have found no case decided by the courts of this country sustaining the position assumed by counsel for the appellant, and the English cases relied on, particularly the case of *Davis v. Bowsher*, 5 Term Rep. 488, decided by Lord Kenyon, states the rule to be, that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule.

This general lien arises from the usage of trade; and the fact that the parties have made the pledge for the particular debt must be held to exclude the intention of creating or relying on a lien that would otherwise exist upon the general deposit account. It is a special deposit or pledge for a special purpose, and when that purpose is accomplished, the lien ceases to exist. A general lien in such a case would be inconsistent with the special undertaking: *Grant on Banking*, 168.

Counsel on each side in this case have bestowed much labor in presenting and reviewing the authorities on this question, and while some of the English cases would tend to sustain the claim of lien, the whole current of American authority is against such a doctrine.

Nor is the appellant entitled to a set-off, either at law or equity, against this claim of the administrator. Mutual debts existing between the intestate and the bank might be set off by the bank, either at law or equity; but in this case, there

was no debt due the intestate. The latter was liable to the bank for a large sum of money, and had pledged his stock in a corporation to pay a part of the debt only. The stock was not converted by the bank into money during the life of the intestate, and no lien, legal or equitable, existed on the part of the bank outside of the pledge. The stock was the property of the intestate in the possession of the bank, and at his death the title vested in his personal representative. If Bangs had mortgaged his personal property to secure this debt, a satisfaction of the mortgage debt by a sale of a part of the personalty would have left the intestate entitled to the remainder free of any encumbrance by reason of the mortgage, and the pledge by a delivery of the possession of the stock to the bank only invested it with an equity to the extent of the pledge made. Equitable rights might have arisen as between the intestate, if living, and the bank, entitling the latter to some of the provisional remedies authorized by the code; but here the personal assets, after satisfying the lien, vested in the administrator, and the specific lien having been removed, the surplus is for distribution between creditors, as provided in sections 33 and 34 of article 2, chapter 39, General Statutes.

When the personal estate is covered by liens giving a creditor priority, the residue, after satisfying the lien, must be paid to other creditors until they have received a sum equal, *pro rata*, with the lien creditor. This statutory provision applies to all liens created on the personal estate, whether by operation of law or by express contract between the parties: *Spratt v. First National Bank of Richmond*, 84 Ky. 85.

The estate being insolvent in any event, the bank must stand back until the other creditors are made equal to the lien asserted and allowed it by reason of the pledge.

The judgment below, conforming to these views, must be affirmed.

27. HOUTON V. HOLLIDAY,

2 *Murphy* (N. C.) 111; 5 *Am. D.* 522. 1812.

Quantum meruit for money had and received. Henry Taylor borrowed of Holliday \$200.00 and pledged as security his negro slave, whose services were worth \$60.00 a year. Taylor died, leaving the slave to his daughter Lucy, who a year later married Houton. The latter paid the loan, received back the slave and

demand of Holliday pay for the services of the slave from Taylor's death until payment of the loan. Verdict for plaintiff for excess of the services over interest on the loan.

By Court, TAYLOR, C. J. It has been the uniform practice of the courts of equity of this state, to make a mortgagee in possession to account for the rents and profits upon a bill filed for redemption. This is a necessary consequence of the principles which prevail in those courts relative to a mortgage, which is considered only as a security for money lent, and the mortgagee a trustee for the mortgagor. To sanction an opposite doctrine, even in the case of pledges where the profits exceed the interest of the money lent, would be to furnish facilities for the evasion of the statute against usury, almost amounting to a repeal of that salutary law. Nothing can come more completely within the legal notion of a pledge, than the slave held by Holliday in the present case, for by the very terms of the contract, it was so to continue until the money should be paid; no legal property vesting in Holliday, who had only a lien upon it to secure his debt. All the profits, therefore, exceeding the interest of his debt, he received to the plaintiff's use, and cannot conscientiously withhold. Wherever a man receives money belonging to another, without any valuable consideration given, the law implies that the person receiving, promised to account for it to the true owner; and the breach of such implied undertaking is to be compensated for in the present form of action, which is according to Mr. Justice Blackstone, "a very extensive and beneficial remedy, applicable to almost every case where a person has received money, which *ex aequo et bono*, he ought to refund." Nor is its application to cases like the present, without authority from direct adjudication; the case of *Astley v. Reynolds*, Strange, 915, furnishes an instance of a man being allowed to receive the surplus which he had paid beyond legal interest, in order to get possession of goods which he had pledged. In principle, the cases are the same; the only thing in which they differ is, that in the case before us, the money was received by the defendant from the labor of the pledge; in the other, it was paid by the sheriff.

Let judgment be entered for the plaintiff.

28. GEMMELL V. DAVIS,

75 Md. 546; 23 Atl. R. 1032; 32 Am. St. R. 412. 1892.

Appeal from an auditor's order for distribution of dividends of stock in a corporation.

McSHERRY, J. (After deciding that a corporation has no lien on the stock of a stockholder to satisfy a debt due the company from him.) There was some additional evidence taken relative to the ownership of Brydon's stock. It appears from this evidence that Brydon's stock was first pledged by him to Henry G. Davis and Company on August 27, 1874. No assignment was then indorsed on the certificates, but the certificates were placed by Brydon in an envelope, and were delivered to one of the members of the firm of Henry G. Davis and Company, and upon or accompanying the envelope was this memorandum, viz.: "August 27, 1874. Five hundred and three shares stock of the North Branch Company William A. Brydon placed in the hands of W. R. Davis as collateral for certain advances by H. G. Davis & Co. Received August 27, 1874, four hundred dollars. W. A. Brydon." Subsequently the assignment of November 13, 1888, was written on the certificates, which, since their delivery on August 27, 1874, have been continuously in the possession of Henry G. Davis and Company. Brydon testified that the assignment was made for the purpose of pledging the stock as collateral security for the payment of the Gouverneur lien, and for a loan of four hundred dollars; though Henry G. Davis and Company claim that the pledge was intended to secure numerous other items of indebtedness on the part of Brydon to them. It further appears that on the twenty-eighth day of October, 1876, Brydon executed the following transfer of the same stock to his wife, viz.: "For value received, I hereby assign and transfer to Susan V. Brydon four hundred and ninety-two shares of the capital stock of the North Branch Company, being certificates No. . . . said stock being now held by H. G. Davis & Co. as collateral security for the payment of the Gouverneur decree, viz., \$5,932.92 for which they hold my note dated June 11, 1875. Witness my hand and seal this twenty-eighth day of October, 1876." This, he testified, was intended as a collateral security for his indebtedness to her. The Gouverneur lien has been paid off and discharged. It was allowed as a valid claim against the North Branch Company on the former appeal in this case; and the four hundred dollars

according to Brydon's testimony, have likewise been settled. That Brydon was justly indebted to his wife when he executed this transfer to her does not admit of a doubt. That he was also indebted to Henry G. Davis and Company for large advances made by them to him is equally certain.

As the case now stands, there are three claimants to the fund constituting the dividend on the Brydon stock, namely, the North Branch Company, represented by its minority stockholders: Henry G. Davis and Company, and Mrs. Susan V. Brydon, though there is no contest between the latter two; for, whilst they both claim the fund, they do not claim it as against each other, but as against the North Branch Company. If Davis and Company are entitled to the dividend, or if Mrs. Brydon is entitled to it, the claim of the North Branch Company must fall. If they be not entitled to it, the North Branch Company will be, provided Brydon is actually indebted to it as alleged.

So far as the appellants are concerned, it makes no difference whether the dividend on the Brydon stock rightfully belongs to Davis and Company or to Mrs. Brydon. Unless the North Branch Company—the body corporate, not Gemmell and Sinclair, as individual stockholders—has a lien on the dividend, which lien is prior in its equities to the claims of Davis and Company and Mrs. Brydon, the contention of the appellants cannot be sustained. Naturally, therefore, the first question which presents itself is, assuming that Brydon is indebted to the North Branch Company in an amount twice as large as the dividend, what claim or lien has the company on that dividend? There is no lien reserved in the charter of this company (Act, 1867, c. 309), or even in its by-laws, in favor of the corporation upon the stock of any shareholder to satisfy or secure a debt due by him to the company. No such lien exists at common law: Angell and Ames on Corporations, secs. 355, 569; Cook on Stocks and Stockholders, sec. 521; *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; and unless created by statute, or by the charter, or, perhaps, in some instances, by a usage brought to the knowledge of, and acted on by both parties, it does not exist at all: *Morse on Banks and Banking*, 505. As the company had, and could have had by implication or by operation of law, no lien on Brydon's stock to secure the debt due by him to it, it was in no position to resist or prevent a transfer of that stock to some one else; but the right of a corporation to withhold a dividend from a stockholder who is indebted to it, rests upon an entirely different principle. It is the right of set-

off; for the dividend is a simple debt owing from the corporation to the shareholder. As in every other case to which this doctrine of set-off is applicable, the debt, that is, the dividend due by the corporation, must be payable by it to the person from whom the obligation to the corporation is demandable. If the stock has passed into the hands of a third party before the dividend has been declared, the right of set-off is gone; because a dividend declared after a transfer of stock has been made belongs to the assignee, and not to the assignor. Had the stock in question been assigned on the company's books, and had new certificates been issued in the name of Davis and Company, or Mrs. Brydon before this dividend was declared, the right of set-off would have been incontestably extinguished. Has it, under the circumstances of this case, been preserved?

As between vendor and vendee, or pledgor and pledgee, of stock, a transfer on the books of the company is not essential to perfect an equitable title in the vendee or pledgee: *Noble v. Turner*, 69 Md. 519, 16 Atl. R. 124; *Baltimore etc. Brick Co. v. Mali*, 65 Md. 96, 3 Atl. R. 285, 57 Am. Rep. 304; *Cecil Nat. Bank v. Watson town Bank*, 105 U. S. 217; *Johnston v. Laffin*, 103-U. S. 800. This principle is fully recognized by the act of 1886, chapter 287, embodied in section 277, article 23 of the code. By the assignment and delivery of certificates the title passed to the pledgee. As between vendor and vendee of shares of stock it is the settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. In other words, dividends belong to the person entitled to the stock when the dividends are declared. *Abercrombie v. Riddle*, 3 Md. Ch. 320. Even though the transfer has not been recorded, the transferee has a right to the dividends, as against the transferrer: *Cook on Stocks and Stockholders*, sec. 541. A pledgee is protected in the same way as a purchaser of stock: *Cook on Stocks and Stockholders*, sec. 432; and consequently dividends declared during the continuance of the pledge belong to him, though he is not registered as owner on the corporate books: *Cook on Stocks and Stockholders*, sec. 468; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed in 71 N. Y. 593. If not so registered, and the corporation pays the dividend in good faith and without notice of the transfer to the nominal owner, the payment would be undoubtedly a good one; but a pledgee who neglects to notify the corporation that he holds the stock in pledge, or to take the proper steps to secure title to the stock in his own name, will not be protected against the lien of the corporation upon the stock to secure the payment of an indebted-

ness contracted to the company by the pledgor in the meantime, and subsequently to the pledge of the shares: *Cook on Stocks and Stockholders*, sec. 525.

Order affirmed with costs.

29. WRIGHT V. BANK OF METROPOLIS,

110 N. Y. 237; 18 N. E. R. 79; 6 Am. St. R. 356. 1888.

Damages for the conversion of stock owned by Wright, and loaned by him to one Elliott to be used as security for a note due the bank, but not to be sold for six months. January 23, 1878, Elliott informed the bank that Mr. Wright consented to a sale of the stock. January 29, 1878, the stock was sold. It was the owner's son who gave the assent, and when plaintiff learned of the sale, May 9, he demanded the stock, tendering the amount for which it had been pledged. October 7, 1879, he began suit. February 14, 1881, it had reached the highest price, \$18,003. Verdict for plaintiff for \$3,391.25. There was no evidence to show that the stock was ever worth just that amount. Both parties were dissatisfied with the amount and appealed.

PECKHAM, J. This case comes before us in a somewhat peculiar condition. As both parties appeal from the same judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge, the case was left to the jury to give the highest price the stock could have been sold for intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under *Romaine v. Van Allen*, 26 N. Y. 309, and several other cases of a somewhat similar nature referred to therein. *Markham v. Jaudon*, 41 Id. 235, followed the rule laid down in *Romaine v. Van Allen*, *supra*. In these cases, a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the *Markham* case,

the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of Romaine.

In this state of the rule the case of *Matthews v. Coe*, 49 N. Y. 57-62, came before the court. The precise question was not therein involved, but the court (per Church, C. J.) took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances, and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, where plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in *Markham v. Jaudon*, *supra*, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment, and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment.

In the course of his opinion the judge said that the rule of damages, as laid down by the trial court, following the case of *Markham v. Jaudon*, *supra*, had "been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness, as a general rule applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states." The rule was not regarded as one of those settled principles in the law, as to the measure of damages, to which the maxim *stare decisis* should be applied. The principle upon which the case was decided rested upon the fundamental theory that in all cases of the conversion of property (except where punitive damages are allowed), the rule to be adopted should be one which af-

fords the plaintiff a just indemnity for the loss he has sustained by the sale of the stock; and in cases where a loss of profits is claimed, it should be, when awarded at all, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted.

The rule thus stated, in the language of Judge Rapallo, he proceeds to apply to the facts of the case before him. In stating what, in his view, would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment, and he added, that if "they had been paid for and owned by the plaintiff, different considerations would arise; but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done."

The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendants was illegal and a conversion, and that plaintiff had a right to disaffirm the sale, and to require defendants to replace the stock. If they failed, then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so. Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff had a valid contract with the broker to hold the stock, and the broker violates it, and sells the stock. The duty of the broker is to replace it at once upon the demand of the plaintiff. In case he does not, it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock, and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock, just as much

as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do.

It is well said by Earl, J., in *Parsons v. Sutton*, 66 N. Y. 92, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not, by inattention, want of care, or inexcusable negligence, permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." See also *Dillon v. Anderson*, 43 Id. 231; *Hogle v. New York Central etc. R. R. Co.*, 28 Hun, 363, the latter case being an action of tort. In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same: Per Denio, C. J., in *Scott v. Rogers*, 31 N. Y. 676; and per Rapallo, J., in *Baker v. Drake*, *supra*. The rule of damages as laid down in *Baker v. Drake*, *supra*, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court: *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 Id. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock, and was the absolute owner thereof. In *Baker v. Drake*, *supra*, the learned judge did not assume to declare that in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the *Romaine* case. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another, and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the *Romaine* case, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, if

it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, the damages claimed, it was necessary to overrule the Markham case, which was done.

Now, so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment than when he had it for a speculation; for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted; and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages

stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damages as light as he reasonably may rests upon him in both cases; for there is no more legal wrong done by the defendant in selling the stock which the plaintiff has fully paid for than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is, that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial; and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume in favor of an investor that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases that there was good faith on the part of the defendant.

It is the natural and proximate loss which the plaintiff is

to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law: *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Hudson River R. R. Co.*, 49 Id. 223.

We think that, beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was \$2,795, and as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold, as then, it is presumed, the defendant paid the check with the proceeds of the sale.

In all this discussion as to the rule of damages, we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence; but we cannot see any question in the case showing bad faith, or indeed, any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott.

The opinion delivered by the learned judge at general term, while agreeing with the principle of this opinion as to the rule of damages in this case, sustained the verdict of the jury upon the theory that if the plaintiff had gone into the market within a reasonable time, and purchased an equivalent of the stocks converted, he would have paid the price which he recovered by the verdict. This left the jury the right to fix what was a reasonable time, and then assumed there was evidence to support the verdict. In truth there was no evidence which showed the value of the stock to have been anything like the amount of the verdict, for the evidence showed it was generally very much less, and sometimes very much more. But fixing what is a reasonable time ourselves, it is seen that the stock within that time was never of any such value.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

30. NORTON V. BAXTER,

41 Minn. 146; 42 N. W. R. 865; 16 Am. St. R. 679. 1889.

Action of foreclosure on a note and mortgage which had been pledged to Baxter, who on default of the pledgor held a pretended sale. Further facts are stated in the opinion.

DICKINSON, J. This is an action to foreclose a mortgage upon a lot of land, designated as lot 14, executed by the defendants Tousley and wife to the plaintiff, in August, 1887, and to bar or enjoin these appellants, Lucy Baxter and Stephen H. Baxter, from proceeding to enforce an earlier mortgage, executed by one Nye, in 1866, under circumstances to be hereafter referred to. This appeal by the two defendants just named is from a judgment granting that relief. The mortgage last referred to, which the appellants claim the right to enforce as the earlier lien, was executed under these circumstances: September 20, 1886, Tousley and wife conveyed several lots of land, including this lot 14, to one Nye, without consideration, and for the use and benefit of the grantor, Tousley. The same day Nye gave to Tousley her (Nye's) promissory note for two thousand five hundred dollars, for the accommodation only of the payee, and executed to him a mortgage upon the same land, in terms securing the payment of the note. Subsequently, prior to Tousley's mortgage to the plaintiff, Nye reconveyed the property to Tousley. While Tousley held the accommodation note of Nye and the mortgage securing it, in October, 1886, he borrowed seven hundred dollars from the defendant Stephen H. Baxter, and a brother, William Baxter, giving to them his note therefor, payable to the defendant Lucy Baxter. As collateral security, Tousley executed an assignment to Lucy Baxter of the Nye note and mortgage, and delivered it to the Baxter brothers. Lucy Baxter had no interest in this transaction, and knew nothing of it, her name being employed for the benefit of the brothers. An agreement accompanied the assigned note and mortgage, authorizing the sale of the pledge after notice, upon default of Tousley to pay the debt secured thereby. June 22, 1888, W. H. Baxter, assuming to act in behalf of Lucy, after notice to Tousley, offered the pledged note and mortgage for sale at auction. Tousley bid \$800 for it, and no other *bona fide* bid was made; but the note and mortgage were struck off to one Prouty, at \$817. The securities were then assigned to him, although he paid nothing therefor, and he reassigned the same to Stephen H. Baxter.

June 29, 1888, Tousley tendered to the Baxter brothers, who then had possession of the Nye note and mortgage, and to Stephen H. Baxter, the sum of \$820 in payment of his own note, which the Nye note and mortgage had been pledged to secure. This tender was sufficient in amount to pay his debt. The tender was refused.

The pretended sale of the pledged securities to Prouty, and the assignment of the same to him, and by him to Stephen H. Baxter, were not effectual as a sale of the securities so as to extinguish or prejudice the previously existing rights of the pledgor. The general property in the pledge remained in the pledgor after as well as before default. The default of the pledgor to pay his debt at maturity in no way affected the nature of the pledgee's rights concerning the property, except that he then became entitled to proceed to make the securities available, in the manner prescribed by law or by the terms of the contract. It is not the case of a defeasible title becoming absolute at law by default in the performance of the prescribed condition. The property was held as security before default. It was held only as security after default. The pledgee was authorized to sell the securities, and by a sale in good faith the pledgor would have been divested of his property. But the pledgee could not give it away, so as to affect the rights of the pledgor, nor could a pretended and merely colorable sale, without consideration, divest the pledgor of his rights as such, or confer upon the pretended purchaser any greater interest than that held by the pledgee.

The question which the appellants now present is, whether, upon tender of payment of the principal debt, the pledged note and mortgage ceased to be available and enforceable as collateral securities. It is a general principle that tender of payment of a debt, to secure which personal property has been pledged, discharges the lien, terminating the special property rights of the pledgee: *Coggs v. Bernard*, 2 *Ld. Raym.* 909, 917; *Ratcliff v. Davies*, *Cro. Jac.* 244; *Hancock v. Franklin Insurance Co.*, 114 *Mass.* 155; *Hathaway v. Fall River Nat. Bank*, 131 *Mass.* 14; *Ball v. Stanley*, 5 *Yerg.* 199; 26 *Am. Dec.* 263; *Mitchell v. Roberts*, 17 *Fed. Rep.* 776; *Loughborough v. McNevin*, 74 *Cal.* 250; 15 *Pac. R.* 773; 5 *Am. St. Rep.* 435; *Ratcliff v. Vance*, 2 *Const. S. C.* 239; *Kortright v. Cady*, 21 *N. Y.* 343; 78 *Am. Dec.* 145; *Cass v. Higenbotam*, 100 *N. Y.* 248; 3 *N. E. R.* 189; *Moynahan v. Moore*, 9 *Mich.* 8; 77 *Am. Dec.* 468; *Stewart v. Brown*, 48 *Mich.* 383; 12 *N. W. R.* 499. The appellants concede that while the general rule is that tender of the amount

due, at the time it becomes due, discharges the lien of collateral securities, yet contend that such is not the effect of a tender after that time. Such a distinction has been recognized in respect to mortgages, based upon the fact that the legal title has become vested in the mortgagee. No such distinction can be made in the case of bailments of personal property as security. The relations and rights of the parties are unchanged by the occurrence of the default. The pledgee has not even after default the absolute legal title. The character of the bailment is not changed. It is still a pledge, and can be enforced or made available only as such. But the very terms of the contract in this case were, that if the debt should be paid "before the sale of said property," the property should be returned.

The appellants rely, also, upon the fact that, so far as appears, the tender of Tousley was not kept good. There is some conflict in the authorities at the present day as to the necessity for this, in general, in order that the lien of the pledge may be discharged. We deem it unnecessary to determine whether the strict rule of the common law has been modified. It may be conceded, for the purposes of this case, that upon equitable grounds a pledgor, whose tender has been refused, should not be allowed affirmative relief, especially of an equitable nature, unless he has kept good his tender, or at least comes before the court in an attitude of willingness to pay what is due from him: *Tuthill v. Morris*, 81 N. Y. 94. The defendants in this case are not entitled to favor upon equitable grounds. The tender made by Tousley, the common debtor of both parties, was sufficient, and, so far as appears, there was nothing to justify the refusal to accept it or to qualify the strict legal effect of the refusal. After an unauthorized, and as it would seem a fraudulent, sale, Baxter, who was a party to it, refusing to accept from Tousley the payment of his debt, asserts in this action the right to hold and enforce the pledged securities, not merely as securities for his debt of seven hundred dollars, but as his own property, the mortgage being an encumbrance of two thousand five hundred dollars, with interest. This plaintiff has not been in default. He owes nothing to the defendants, and is not chargeable with fault because the debtor did not keep his tender good. He also is a creditor of Tousley, having mortgage security junior to that which was pledged to the defendants. Tousley, the common debtor, was bound to pay both. The unjustified refusal of Baxter to accept payment was prejudicial to the plaintiff

holding the junior mortgage. The pledged note and mortgage of Nye, if released from the pledge, would not, as to the plaintiff, have been available in Tousley's hands as a senior encumbrance upon the land, having been executed for the accommodation of Tousley. In view of the relations between the plaintiff and Baxter, there appears to be nothing to modify the strict rule of the common law, that a tender of payment of the debt discharges the pledge, so far, at least, as it affects the plaintiff. Of course the debt of Tousley was not thus discharged.

Judgment affirmed.

31. ROBINSON V. HURLEY,

11 Ia. 410; 79 Am. D. 497. 1860.

Action for \$554.69 due on promissory note. Plea of payment and set-off. As security for the note defendant gave plaintiff two city orders on the treasurer of Dubuque city for \$500 and \$250, respectively, with right, if note was not paid at maturity, to sell at private sale, and satisfy the note and costs out of the proceeds. The note was not paid, and six months later plaintiff sold the scrip at 45 cents on the dollar. Evidence that it was worth 75 to 80 cents at the maturity of the note, and 40 cents at the time it was sold, was excluded. Verdict of \$77.50 for defendant.

By Court, LOWE, C. J. Upon the foregoing facts, the court, at the request of the defendant, gave the following instructions as the law of this case, to wit: That under the receipt offered in evidence by defendant, if the plaintiff sold the scrip at all, he was required by the terms of the receipt to sell the same at or about the time of the maturity of the note; and that if they (the jury) find from the evidence that said plaintiff had not sold the scrip, he was liable for the value of said scrip at or about the time of the maturity of the note. The court also refused to charge the jury that the value of the scrip, at the time it was sold by the plaintiff, was the measure of his liability to the defendant for the same.

If the plaintiff acted tortiously or misappropriated the scrip in disposing of it at the time he did, the above rule of damages would seem to be proper and just. But if it was his right, under the law which governs pledges, even as modified by the contract of the parties in this case, to sell these collateral securities at the time and under the circumstances which he did, then there was no misappropriation, and a different criterion

of damages obtains, to wit, the value of the scrip at the time of its conversion.

That we may arrive at a better understanding of the rights, duties, and obligations of the parties under the receipt in question, let us inquire what they would be under the law in the absence of such a contract. After the debt falls due, the pledgee, under the law, has his election to pursue one of three courses: 1. To proceed personally against the pledgor for his debt, without selling the collateral security; or 2. To file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; or 3. To sell without judicial process, upon giving reasonable notice to the debtor to redeem: 2 Kent's Com., 9th ed., 785; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303. The plaintiff, in executing said receipt, did not waive his right of adopting either of the above methods to satisfy his claim. The only change made in the rights and obligations of the parties by this instrument was simply to dispense with notice to the debtor to redeem before the creditor could sell. There is nothing in the language or terms of this receipt which obliged the plaintiff to sell these collaterals at the maturity of the note. He simply reserved the right to do so, a right which the law gave him, without such reservation, upon giving notice to redeem. A postponement of the exercise of this right is a thing of which the debtor cannot very well complain; it only enlarges his opportunity to redeem, and thereby prevent any sacrifice that might result from a forced sale of the pledge. The depreciation in this case which the scrip in question suffered, between the maturity of the note and the sale of the same, was without the fault or power of prevention on the part of the plaintiff. He was only bound to that attention and diligence in the preservation of the thing pledged which a careful man bestows upon his own property, for the reason that the arrangement or contract was reciprocally beneficial to both parties. We conclude, therefore, that the plaintiff, in selling the collateral securities at the time and under the circumstances which he did, violated no obligation or duty growing out of the understanding of the parties, or expressed by the receipt or law itself. And if we are right in this conclusion, it follows that the measure of his liability for said scrip is the value thereof at the time of conversion. This rule of damages in cases of this kind is well established: See *Sedgwick on Damages*, 365, 366, 480, 481, and authorities there cited.

Judgment reversed, and new trial granted.

32. MARYLAND INSURANCE CO. V. DALRYMPLE,

25 Md. 242; 89 Am. D. 779. 1866.

Action on counts in trover for conversion and in tort for damages for the illegal sale and conversion of 325 shares of Baltimore and Ohio Railroad stock, pledged to the company to secure the repayment of a loan to Dalrymple of \$19,500.00. The pledgee was given the right, if the loan was not promptly paid, on one day's notice to sell the collaterals without further notice. From the date of the loan, June 12th, 1860, to November 15th, 1860, the market price of the stock steadily declined from \$79 per share to \$56½ per share. Frequent calls were made on Dalrymple to return the loan, and he made ineffectual attempts to negotiate, but these had ceased, and final notice to pay had been given by the company and received by Dalrymple before November 20th, 1860. On that day the company had the shares publicly sold at the board of brokers, and bid in for themselves by a broker at the highest obtainable price, \$55 per share. An account was rendered Dalrymple showing a balance due from him of \$1,774.50, payment of which was demanded. The company held the stock till the spring of 1862, when they had it sold publicly at the board of brokers at from \$60 to \$67 per share, yielding in all \$19,943.75 net. Two dividends were received by defendants during this time. December 16th, 1862, Dalrymple tendered defendants the loan with interest, and demanded the stock. The tender was refused. The stock at this time was worth \$78 per share, and at the time of the trial, \$115 per share. From the verdict for plaintiffs both parties appealed.

By Court, BARTOL, J. (After stating the facts and various prayers of the parties.) The court below seems to have considered the sales in 1860 and 1862 as wholly void and inoperative and the bailment still continuing, and instructed the jury that upon proof of the pledge, and the tender, demand, and refusal in December, 1862, the plaintiff was entitled to recover, and the measure of damages was the market value of the stock at that time, together with the dividend received by the defendant in April, 1861, deducting therefrom the amount of the loan and interest. Having thus stated the positions taken by the parties in their several prayers, and by the court below in its instruction to the jury, we shall proceed to express as briefly as we can the judgment of this court upon the questions involved, so far as they are deemed material to the decision of the case.

In doing so, we shall confine ourselves mainly to a statement of the conclusions we have reached after a careful examination of all the authorities cited in argument, without attempting to refer to them particularly, or to reconcile them where they may be in conflict. To do so would require this opinion to be extended to very great length without, perhaps, subserving any good purpose.

The first question that naturally presents itself for our consideration is the effect of the sale and purchase of the stock made by the defendant in November, 1860. By the terms of the contract, the loan was payable on one day's notice, and if not paid according to the agreement, the defendant was authorized without further notice to sell the stock pledged for the purpose of satisfying the same. Unquestionably, the notice given on the 13th of November was sufficient, under the contract, to entitle the defendant to sell on the 20th.

In the absence of any express agreement to the contrary, it has been held in some cases to be necessary for a pledgee before exercising the power of sale to give notice to the pledgor of the time and place of sale: *Washburn v. Pond*, 2 Allen, 474; and the same rule was announced by the superior court of New York in *Wheeler v. Newbould*, 5 Duer, 29; and by the court of appeals in the same case, 16 N. Y. 392. Without expressing any opinion upon the law as laid down in those cases, it is clear it can have no application to a case where such notice is dispensed with by the contract of the parties. Here by the words of the agreement authorizing the defendant upon default to sell without further notice, we understand that when the power to sell arose, all notice of the time and place of sale was waived and dispensed with by the plaintiff, leaving upon the defendant the obligation to sell publicly and fairly for the best price he could obtain: See 2 Kent's Com. 582, 583.

A sale at the board of brokers, publicly and fairly made, would, in our opinion, have been legal and valid; and if the sale of the 20th of November had been made to a third person, it would have been a legal sale under the contract, vesting a good title in the purchaser, and terminating the bailment. It was contended by the plaintiff's counsel that the sale must in all cases be made at public auction, and that a sale at the broker's board would not be legal; and some decisions in New York were cited in support of this view.

In *Brown v. Ward*, 3 Duer, 660, it was said that a "custom has grown up [in New York], and been sanctioned by the courts, of selling stock at the Merchants' Exchange."

There is no evidence of any such custom in Baltimore, and considering the requirements of the law, and the reason and nature of the transaction, we are of the opinion that the most proper and suitable place for a sale of stock is at the board of brokers. There is the stock market,—the mart to which vendors and purchasers resort, by their agents, to buy and sell stock, where competition among bidders is most apt to be found,—such sales are public, and unless there be in the particular case some ground for impeaching their fairness, we are of opinion they are reasonable and ought to be supported.

But, as we have seen, the defendant became itself the purchaser of the stock, and the question arises, What was the legal effect of the proceeding? Did it amount to a valid and effectual sale so as either to vest in the defendant, as purchaser, an absolute title, or to operate as a conversion of the property, break up the bailment, and the relation of bailor and bailee between the parties?

The doctrine that trustees, executors, administrators, and others holding fiduciary relations are incompetent to purchase the property held by them in trust is well settled: See Story's Eq. Jur., secs. 321-323, where the cases are collected. In section 323 the learned author says: "There are many other cases of persons standing in regard to each other in like confidential relations in which similar principles apply." Lord Chancellor Cottenham, in *Greenlaw v. King*, 5 Jur. 18, cited in *Torrey v. Bank of Orleans*, 9 Paige, 663, held that "the principle was not confined to a particular class of persons, such as guardians, trustees, or solicitors, but was a rule of universal application to all persons coming within the principle, which is, that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser." See also *Keighler v. Savage Mfg. Co.*, 12 Md. 384 [71 Am. Dec. 600]; *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Id. 456; *Cumberland C. & I. Co. v. Sherman*, 20 Id. 117 [77 Am. Dec. 311]. This rule rests upon grounds of public policy, and is enforced without regard to the question of *bona fides* in the particular case. It is clear, both upon reason and authority, that the case of pledgor and pledgee comes within the rule.

In Story on Bailments, sec. 319, it is said: "In respect of sales, also, there is a salutary restraint upon the pawnee to secure his fidelity and good faith that he can never become a purchaser at the sale. This rule will be found recognized equally in the common law and the Roman law."

It has been argued, on the part of the defendant, that this is a purely equitable doctrine, to be enforced only in courts of equity on grounds not cognizable at law; and while such sales are voidable in equity, they must be treated in this forum as valid.

This question is not free from difficulty, but the conclusion we have reached from an examination of the cases is clearly expressed in the third point of the plaintiff's brief.

While in cases of pure trust, where exclusive jurisdiction is in equity, resort must be had to that tribunal for relief, and sometimes, in cases of *quasi* trust, that court will grant relief where there are special circumstances requiring such interference, as in *Hasbrouck v. Vandevoot*, 4 Sand. 74, yet the relation of pledgor and pledgee, being a legal relation, its rights and duties are defined by law, and the remedies for violation of such duties are ordinarily in a court of law.

The sale of the pledge by the defendant to itself was contrary to the faith of the bailment, forbidden, as we have shown by the citation from *Story*, by the common law, and might be treated by the bailor at his election as a tortious conversion of the property. In this case, no such election was made by the plaintiff. There was no transmutation of title or change of possession, and the sale being inoperative to work a conversion, the relation of the parties remained unchanged thereby. The defendant remained in possession of the stock as before, in the same manner as if the sale had been attempted, and both in fact and in contemplation of law the bailment continued. This point was decided in *Middlesex Bank v. Minot*, 4 Met. 325. That decision was followed by the supreme court of Iowa in *Bank v. Dubuque & P. R. R. Co.*, 8 Iowa, 277.

Looking at the reasoning upon which those decisions rest, and the rules and principles of the law governing contracts of this description, we are of opinion that the decision of *Middlesex Bank v. Minot*, 4 Met. 325, so far as this point is concerned, was correct. The sale of the 20th of November did not operate either to vest the title in the defendant as purchaser, or to work a conversion of the stock. The bailment continued, and if nothing more had been done subsequently, and the stock had remained in the defendant's possession, there can be no doubt that the tender and demand made on the 16th of December, 1862, would have been valid, and the refusal on the part of the defendant at that time would have given a good cause of action to the plaintiff. But it appears from the proof that before that time, in the spring of 1862, the defendant

caused the stock to be sold publicly at the board of brokers, and it was transferred to the several purchasers. What was the effect of those sales? Having given notice to pay the loan in November, 1860, the defendant was not bound to keep the pledge; the attempted sale of the 20th of November being inoperative, and the plaintiff continuing in default, the power to sell conferred by the contract still continued, and was in fact executed by the sales made in 1862. As we have already said, no further notice was required by the contract, nor can any valid objection be made to the place and mode of sale, the same not being impeached on the ground of unfairness or bad faith. By those sales the bailment was ended; and being made, as we have said, in the lawful and valid exercise of the power of sale, there was no violation of the contract on the part of the defendant, or any tortious conversion of the stock; and therefore the plaintiff was not entitled to recover in this form of action; and the fifth prayer of the defendant ought to have been granted.

The sales and transfer of the stock made in 1862 being valid and legal, the plaintiff would have the right to recover in an action *ex contractu* any excess which might remain in the hands of the defendant arising from the proceeds of these sales, including the dividend received on the 16th of April, 1861, with which the defendant would be chargeable after deducting the amount of the loan and interest due at that time; such excess would be simply money had and received by the defendant to the use of the plaintiff, under and in conformity with the contract; even if the sales had been tortious, we entertain the opinion that the true measure of damages would be as stated in the defendant's fourth prayer, which asserts the right of the defendant to recoup from the damages the amount of the debt; but that question does not arise in this case; the sales not being tortious, there could be no question of the right of the defendant to retain out of the sums which came to its hands the amount of the loan and interest; and even in a proper form of action, the excess only could be recovered. But the question arising upon the pleadings is not of any practical importance in this case, because it is evident from a simple calculation that the money which actually came to the defendant's hands from the sales of the stock and the dividend of April, 1861, was less than the debt and interest due, and nothing, therefore, could be recovered by the plaintiff in any form of action.

The conclusion from this opinion is, that there was no error

in rejecting the plaintiff's prayers, and the first, second, third, and fourth prayers of the defendant. But the court below erred in rejecting the fifth prayer of the defendant, and in the instruction given to the jury; the judgment will therefore be reversed on the defendant's appeal.

Judgment reversed.

B. LOCATIO, OR HIRING.

CHAPTER VII.

OF LOCATIO REI.

33. COBB V. WALLACE,

5 Coldwell (Tenn.) 539; 98 Am. D. 435. 1868.

Action for value and hire of a barge on counts for breach of contract in failing to redeliver, for negligence in keeping and for conversion of the barge. Verdict for defendants.

By Court, ANDREWS, J. . . . The evidence in the record tends to show the following state of facts:—

In December, 1863, the plaintiffs' barge being at Hawesville, Kentucky, a place on the Ohio River, and having then on board a load of coal, the defendant purchased the coal from the plaintiffs, and at the same time hired the barge at the rate of three dollars per day, for the purpose of conveying the coal to Nashville. These bargains were made in parol between the defendant in person and D. Looney & Co., the agents of the plaintiffs. There is evidence tending to prove that this parol contract of hiring was that the defendant should employ the barge to convey said load of coal to Nashville, and that the barge should be returned to the plaintiffs, at Hawesville, as soon as the coal could be taken to Nashville and discharged, and that no authority was given to defendant to use the barge in any other manner, or for any other purpose. Soon after the making of these contracts, the barge with its cargo of coal was delivered to J. W. Ross, the agent of the defendant, who executed and delivered to D. Looney & Co. the following receipt:—

“HAWESVILLE, December 12, 1863.

“Received from D. Looney & Co., one barge, Aurora, No. 8, containing 1,166 bushels of coal, which I agree to pay D. Looney & Co., at Louisville, at the rate of twenty cents per bushel. And I further agree to hire said barge, Aurora, No. 8, and pay D. Looney & Co. three dollars per day from this date until the barge is returned at Hawesville, in good order.

“J. W. Ross, agent of W. B. Wallace.”

The barge arrived at Nashville, and was unloaded early in January, 1864. The defendant then retained it, and for some length of time employed it in the business of transporting wood upon Stone River. Looney, one of the plaintiffs' agents, called upon defendant frequently, both by letter and personal application, for the return of the barge, within six weeks of the hiring, and frequently after that time, until he heard of its seizure, as hereinafter stated. About the middle of April, 1864, the defendant sent the barge from Nashville in charge of his agent, on its way to Hawesville, for the purpose of delivering it to the plaintiffs. But on its way thither the barge was seized by persons in the military service of the United States, by what authority does not appear, and was appropriated to the use of the military authorities, and has never been recovered or returned to the plaintiffs.

(After deciding that parol evidence was admissible where the original contract is in part only reduced to writing and the parol evidence does not contradict or vary the terms of the written instrument.)

But we think that the circuit judge also erred in his construction of the writing in question, even if we were compelled to consider it as the only evidence of a contract in the case. He instructed the jury, in substance, that under it the defendant had it at his option to say when the contract was at an end, and might continue to use the barge so long as he paid the stipulated hire; and that the contract for the hire would not be terminated until the defendant so elected.

In cases of bailment, where the contract is indefinite as to the time of its continuance, the bailee has not the arbitrary and exclusive right to determine at what time it shall terminate. If the bailment is for an explicitly declared purpose, it terminates whenever that purpose is accomplished. If the time be not fixed by agreement, or by the nature of the object to be accomplished, then the bailee must return the property whenever called upon, after a reasonable time; and what time is reasonable must be determined by the circumstances of each particular case: 2 Parsons on Contracts, 128, 129. And therefore to recur again to a question already discussed, if the written contract does not in its terms specify the time of its continuance, parol evidence becomes necessary in order to enable the jury to determine what length of time is reasonable under the circumstances.

Still another objection may be urged against the charge of the circuit judge in this case. The jury were instructed, in

substance, that the fact that the plaintiffs had written letters to the defendant, demanding the boat, after the commission of the act claimed by the plaintiffs as a conversion, was a waiver of the conversion.

We are not aware of the existence of such a doctrine. If the owner, with knowledge of the facts constituting the conversion, again take possession of the property converted, as owner, this will be evidence of a waiver of the conversion: *Traynor v. Johnson*, 1 Head, 51. But we know of no case where it is held that a demand on the part of the owner for the return of his property, or any other effort made by him for its recovery, would be of itself a waiver of a previous conversion. The law attaches no such penalty to attempts by the owner of wrongfully appropriated property to recover its possession. Demand must be made in a large class of cases before an action can be maintained for conversion. Still the demand and refusal do not in themselves constitute the conversion, but are only the evidence of it: 2 Greenl. Ev., sec. 644; 1 Chitty's Pleading, 158. And it cannot be held that the demand, which the law requires to be made before suit, should of itself operate to bar the right of action. If the defendant, without the consent of the plaintiffs, and in violation of his contract, detained the barge, and employed it in a different place, and for a totally different purpose from that contemplated by the contract, the jury would have been authorized to find him guilty of a conversion, independently of the evidence furnished by repeated demand for its return, and the defendant's refusal to return it: 2 Greenl. Ev., sec. 642. See the cases in Tennessee, collected in 1 Heiskell's Dig., 237. And we think such conversion would not be waived by a subsequent demand of the property.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial.

34. SPOONER V. MANCHESTER.

133 Mass. 270; 43 Am. R. 514. 1882.

Trover for a hired horse. Judgment for plaintiff below.

FIELD, J. This case apparently falls within the decision in *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when after traveling on it five or six miles, he discovered his mistake, he intentionally

took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when as in this case the property has been returned to and received by the owner by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him by relation as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention

to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491, Mr. Justice GRAY says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes v. Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*, 8 Exch. 431; *Wilson v. McLaughlin*, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*, 8 Metc. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice SHAW says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and *Loring v. Mulcahy*, 3 Allen, 575, were both decided upon the ground that the de-

fendant either assumed to dispose of the property as his own, or intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In Gilmore v. Newton, 9 Allen, 171, 85 Am. D. 749, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. Fouldes v. Willoughby, *ubi supra*; Wilson v. McLaughlin, *ubi supra*; Nelson v. Merriam, 4 Pick. 249; Houghton v. Butler, 4 T. R. 364; Heald v. Carey, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV, 75, pl. 9.

Exceptions sustained.

35. DAVIS V. GARRETT,

6 Bingham 716; 19 E. C. L. 321. 1830.

Action for the value of a barge of lime lost in a storm at sea. Verdict for plaintiff.

TINDALL, C. J. There are two points for the determination of the court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the Court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the

same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James*, 4 Camp. 112, where the ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

(Omitting a question of practice.) Judgment for plaintiff. Rule for new trial and for arrest of judgment discharged.

CHAPTER VIII.

OF LOCATIO OPERIS.

36. SICKELS V. PATTISON,

14 Wend. (N. Y.) 257; 28 Am. D. 527. 1835.

Action for services in transporting lumber. Defendant set up damage due to plaintiff's failure to fully perform the contract. Judgment for defendants for \$34.94. Plaintiffs bring error.

By Court, NELSON, J. The testimony of Richards was sufficient proof of the contract between the plaintiffs and the defendant, as to the transportation of the lumber to market, to justify the court in submitting the fact to the jury. When the plaintiffs purchased the boats, they agreed to assume the contracts made by Richards, one of which was with the defendant; and they afterwards admitted that they had renewed them with the persons concerned.

The charge, however, of the court to the jury was erroneous. It assumed the principle, that if the contract was entire and not fulfilled by the plaintiffs, they were not only bound to refund the amount paid towards freight, but were also liable to damages for the non-fulfillment. The defendant having paid thirty dollars towards the transportation of the lumber, a subsequent failure to perform the whole contract would not entitle him to recover it back; for if he undertook to recover back the amount paid, under the idea of a rescindment of the contract, he would be met by the equity growing out of the services actually rendered, and which should be taken into consideration in adjusting the rights of the parties. The true remedy in such a case is an action for damages for the violation of the agreement; or, as in this case, the defendant may, if he chooses, set up the breach and claim damages, for the purpose of diminishing or even extinguishing any amount which the plaintiffs seek to recover for the freight of the lumber.

It is true, if the contract was entire, a failure to perform would of itself be an answer to a recovery for the remainder of the freight money, as the plaintiffs could not maintain an

action upon such a contract, after they had broken it. The compensation in this case, I am inclined to think, did not depend upon the transportation of all the lumber. The stipulation was for a fixed sum for one thousand pieces, and no time of payment was mentioned. In contemplation of law it would probably be due on the delivery of the lumber at market. The delivery of the whole lumber at market was not a condition precedent to the payment of the freight. It would become due, and be demandable as fast as delivered. If so, the plaintiffs would be entitled to prosecute for the freight of the quantity delivered. If the jury were satisfied that by the contract the whole that was ready to be transported to market by the canal could have been carried, then the defendant would be entitled to damages; and it would be proper to prove them, with the view of reducing the amount claimed, or even extinguishing it, if the damages were large enough to cover it: 8 Wend. 109. As to the charge for the use of the landing, the testimony is not very clear upon the point. It would seem, from the testimony of Richards, that he was to charge nothing for the use of his landing for the lumber of the persons with whom he contracted; and if so, it necessarily follows, from the evidence, that the plaintiffs are not entitled to make any charge, as they took his place. This, however, is a question of fact for the jury to determine.

Judgment reversed, and *venire de novo*.

37. SENSENBRENNER V. MATTHEWS,

48 Wis. 250; 3 N. W. R. 599; 33 Am. R. 809. 1879.

Replevin by plaintiff against Matthews, a deputy sheriff, for a buggy taken under a writ of replevin secured by one Henry. Plaintiff owned a building, part of which he occupied with a blacksmith shop. Another part he leased to Schweitzer & Co. as a wagon shop, who in turn sublet the second story to Maxwell for a paint shop. This was connected with the blacksmith shop by a trap door through which Maxwell had the right to take and return articles for painting. Maxwell employed Schweitzer & Co. to do the wood work and Sensenbrenner to do the iron work on the buggy, after the completion of which he removed it to his shop, painted it, and sold it to Henry. Plaintiff forbade its removal until Maxwell should settle with him for the iron work, but Matthews and Henry, by virtue of a writ of

replevin, peaceably removed the buggy from the shop in the plaintiff's absence. Judgment for defendant.

RYAN, C. J. The shops of the appellant, Schweitzer and Maxwell, although in the same building, were held by them respectively in severalty; and the right of way of Maxwell, although passing through the shops of the appellant or Schweitzer, was part of his holding and used by him of his own right.

The buggy belonging to Maxwell was delivered to him through the right of way by the appellant, after it had been ironed by the latter. It was delivered with the expectation that it should be painted by Maxwell; but Maxwell owed no duty, either to Schweitzer or the appellant, to paint it. The delivery was unconditional, and the buggy must be taken to have been delivered to Maxwell in his right as owner of it.

This delivery operated as an absolute waiver of all lien of the appellant for ironing the buggy. The essence of lien, in such cases, is possession. Lien cannot survive possession; and except in case of fraud, and perhaps mistake, such a lien cannot be restored by resumption of possession. "Lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession; and whether that possession be of officers of the law or of the person who claims the right of lien, the chattel on which the lien attaches is equally regarded as in the custody of the law. Lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer." 3 Pars. on Cont. 234.

"The voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien; for as it is a right founded upon possession, it must ordinarily cease when the possession ceases." Story on Agency, sec. 367.

As this disposes of the lien set up by the appellant to support this action, it is immaterial how the respondents came into possession. In replevin, a plaintiff recovers on his own right of possession, not on the weakness of the defendant's right.

BY THE COURT.—The judgment of the court below is affirmed. Judgment affirmed.

38. SMALL V. ROBINSON,

69 Me. 425; 31 Am. R. 299. 1879.

APPLETON, CH. J. This is an action of replevin for a pair of wheels and other parts of a hack, upon which the defendant claims a lien, by reason of work done by him upon them.

The plaintiff is the owner of the hack. It was left for repairs by one Staples, who was in possession under a contract of purchase, the terms of which were unperformed. The defendant was aware of the plaintiff's title. The presiding justice found that the plaintiff had never given Staples any authority to subject the hack to a lien for repairs, and ruled that no such authority was to be implied as a matter of law, from the relation of the parties.

"A lien," observes SHAW, Ch. J., in *Hollingsworth v. Dow*, 19 Pick. 228, "is a proprietary interest, a qualified ownership, and in general, can only be created by the owner, or by some person by him authorized." Here the fact of authority is negatived. The plaintiff never became the debtor of the defendant, and never authorized the imposition of any lien on his property. *Globe Works v. Wright*, 106 Mass. 207. A mortgagor of horses cannot, without the knowledge, acquiescence and consent of the mortgagee, intrust the horses to be boarded so as to subject them to a lien for keeping, as against the mortgagee. *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208. CUSHING, Ch. J., in the case last cited, says: "I have seen no case in which it has been held that a party who permits another to have possession of his personal property, by so doing in law, constitutes that other his agent to sell or pledge the property." So a bailee can give no lien upon property bailed, as against the owner. *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. R. 13.

The defendant could acquire no title from Staples, when he had none.

The exceptional case of the inn-keeper rests upon the principle that as he is by law bound to receive a guest and his goods, and might be liable to indictment for not so receiving them, he shall have a lien on such goods as he is bound to receive, whether owned by his guest or not.

Exceptions overruled.

39. WILLIAMS V. ALLSUP,

10 C. B. (N. S.) 417; 100 E. C. L. 417. 1861.

Action for the value of a steamboat.

ERLE, C. J. This is an action by the mortgagee of a steam-vessel against a shipwright who had done certain repairs on the vessel at the request of the mortgagor, who had been allowed to be in the possession and apparent ownership. The defendant

claims a lien upon the ship for the price of these repairs; and I am of the opinion that the claim is well founded. There is, it seems, no authority to be found bearing upon the question, though I presume it must have arisen many times. I should rather expect that it had never been made the subject of litigation because the right of a lien has always been admitted to attach. I put my decision on the ground suggested by Mr. Mellish, viz., that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage-debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested: he puts her into the hands of the defendant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien upon the ship, so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. The 70th section of the Merchant Shipping Act, 17 & 18 Vict. c. 104, does not appear to me at all to interfere with this view. It does not to my mind establish the right of the mortgagee to the possession of the ship, or negative the lien of the person doing the repairs. That section enacts that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt." The implication upon which I found my judgment is quite consistent with that provision. The vessel has been kept in a state to be available as a security to the mortgagee, by her destruction being prevented by the repairs which the defendant has done to her. I think there is nothing in the 92d section to affect this question. There is, no doubt, some difficulty in the case. But it is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien upon the ship for repairs neces-

sary to keep her seaworthy. For these reasons, I am of the opinion that the defendant is entitled to judgment.

(WILLES, J., and BYLES, J., rendered concurring opinions.)
Judgment for the defendant.

40. GRINNELL V. COOK,

3 Hill (N. Y.) 485; 38 Am. D. 663. 1842.

Case, to recover the value of horses taken and sold by Cook, a deputy sheriff, under a writ against their owner, Tyler. Grinnell, an inn-keeper, claimed a lien for boarding the horses five weeks in his stable. Writ of error from a non-suit of plaintiff.

By Court, BRONSON, J. It is said that Martin proves an express promise to pay for the keeping of the horses. If that were so, it would not aid the plaintiff in this action. This is not *assumpsit*, but an action on the case where the plaintiff seeks to recover on the ground of a lien. And besides, Martin was not the agent of the plaintiff, and what the defendant said to him seems not to have been intended for the plaintiff, but for Sheldon, who had receipted the horses to the constable. The conversation was not communicated to the plaintiff, and he will never be able to make anything out of it: *Stafford v. Bacon*, 1 Hill, 532 [37 Am. Dec. 366], certainly not in this action.

The innkeeper is bound to receive and entertain travelers, and is answerable for the goods of the guest although they may be stolen or otherwise lost without any fault on his part. Like a common carrier, he is an insurer of the property, and nothing but the act of God or public enemies will excuse a loss. On account of this extraordinary liability the law gives the innkeeper a lien on the goods of the guest for the satisfaction of his reasonable charges. It was once held that he might detain the person of a guest, but that doctrine is now exploded, and the lien is confined to the goods. The inquiry then is, whether the plaintiff received and kept the horses as an innkeeper. In other words, was he bound to receive and take care of them, and would he have been answerable for the loss if the horses had been stolen without any negligence on his part? The lien and the liability must stand or fall together. Innkeepers can not claim the one with any just expectation of escaping the other.

Tyler, who owned the property, was not a traveler, nor was he in any sense a guest in the plaintiff's house; and I think it quite

clear that the plaintiff was not bound to receive and take care of the horses. We are referred to the case of *Peet v. McGraw*, 25 Wend. 653, to prove that it is not necessary to the lien, or the liability of the innkeeper, that the owner should be a guest. The case decides no such thing. It turned on the construction of the plea, and we thought the words of the plea equivalent to an averment that the owner was a guest. A single expression of the chief justice, which was not necessary to the decision of the cause, is separated from the context, and pressed into the plaintiff's service. But neither the chief justice nor any other member of the court intended to say, that either the lien or the liability could exist where the owner of the goods was not either actually or constructively the guest of the innkeeper. There must be such a relation; but it is not necessary to its existence that the owner of the goods should be actually *infra hospitium* at the time the loss happened, or the lien accrued. For example, if a traveler leave his horse at the inn, and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn. And if the owner leave the inn and go to another town, intending to be absent two or three days, it seems that the same rule holds good, so far as relates to property for the care and keeping of which the host is to receive a compensation; but it is otherwise in relation to inanimate property from which the host derives no advantage, and if that be stolen during such absence of the guest, the innkeeper will not be answerable: *Gelley v. Clerk*, Cro. Jac. 188; *Noy*, 126; *Yorke v. Grenaugh*, 2 Ld. Raym. 866; 1 Salk. 388, by the name of *York v. Grindstone*; Bac. Abr., Inns and Innkeepers (C.), 5, 7th Lond. ed. The case of *Mason v. Thompson*, 9 Pick. 280 [20 Am. Dec. 471], goes still further. There the traveler never went to the inn, but stopped as a visitor with a friend, and sent her horse and carriage to the inn. After four days she sent for the property, and found that a part of it had been stolen; but still the innkeeper was held liable. This case rests on the *dictum* of Powell and Gould, JJ., against the opinion of Lord Holt, in *Yorke v. Grenaugh*, 2 Ld. Raym. 866, that "if a man set his horse at an inn, though he lodge in another place, that makes him a guest, and the innkeeper is obliged to receive him [the horse]; for the innkeeper gains by the horse, and therefore makes the owner a guest, though he was absent." But the decision turned on the construction of the avowry and the proper mode of pleading. The two judges held, "that since the matter shown makes it appear that he was a guest, it is enough, though it is not expressly

averred that he was a guest." But Holt said: "This matter is but evidence of it, that he was a guest, and is not traversable; but guest or not, is the most material part of the avowry, and traversable; and therefore there ought to be a positive averment that he was a guest." This is not all. The two judges gave as the authority for their *dictum* the case of Robinson v. Walter, Poph. 127. The point there decided was, that the innkeeper had a lien on the plaintiff's horse, although the animal was brought to the inn by one who took him wrongfully. And that is good law at this day, if the innkeeper have no notice of the wrong, and act honestly: Johnson v. Hill, 3 Stark. 172. He is bound to receive the guest, and cannot stop to inquire whether he is the right owner of the property he brings. But not one word was said in the case of Robinson v. Walter, in support of the position that the owner or person who brings the property need not be a guest. The subject was not even mentioned, so far as appears by the report in Popham. But by the report of the same case in 3 Bulst. 269, it appears affirmatively that the wrong-doer who brought the horse to the inn actually became a guest, and afterwards went away, leaving the horse behind. Now when a man, after he has actually become a guest and delivered his property to the host, goes away for a brief period leaving his goods behind him, the law is chargeable with no absurdity in considering him as still continuing a guest so far as relates to the rights and liabilities of the parties. And if one send his horse or his trunk in advance to the inn, saying he will soon be there himself, it may be that he should be deemed a guest from the time the property is taken in charge by the host. But when, as in Mason v. Thompson, the owner has never been at the inn, and never intends to go there as a guest, it seems to me little short of a downright absurdity to say, that in legal contemplation he is a guest. If our law-givers had intended that the innkeeper should be answerable as such for everything he received in charge, guest or no guest, they would have said so. They would not have taken the roundabout mode of saying that he must answer for the goods of the guest, and that every one is a guest who has goods in his hands. Now in this case, Tyler, who owned the horses, never was the plaintiff's guest; nor was he a traveler or transient person. He was the plaintiff's neighbor. In this respect the case differs from Mason v. Thompson, though I should feel no disposition to follow that decision if this difference did not exist. I think the extraordinary liability of the innkeeper does not attach until he actually has a guest, and without such liability the innkeeper, as such, has no lien on

the goods. Whether he has a lien in any other character remains to be considered.

The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the right has been extended so far that it may now be laid down as a general rule, that every bailee for hire who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery-stable keeper, for the reason that he only keeps the horse, without imparting any new value to the animal. And besides, he does not come within the policy of the law, which gives the lien for the benefit of trade. Upon the same reasons the agister or farmer who pastures the horses or cattle of another has no lien for their keeping, unless there be a special agreement to that effect. This doctrine was laid down in *Chapman v. Allen*, Cro. Car. 271. And in *Yorke v. Grenaugh*, 2 Ld. Raym. 868, Lord Holt said, a livery-stable keeper has no lien. See the remarks of Lord Lyndhurst, C. B., upon this case in *Judson v. Etheridge*, 1 Crompt. & Mee. 743. I am not aware that this rule has ever been departed from, though it has been suggested that it would be well enough to place the livery man on the same footing with other persons who bestow their labor and care upon the property entrusted to their keeping: Cowen's Tr. 299, 2d ed.

But the question has recently undergone a good deal of discussion in England, and the result is that the old cases remain unshaken, and it must now be regarded as the settled doctrine that agisters and livery-stable keepers have no lien unless there be a special contract to that effect: *Wallace v. Woodgate*, 1 Car. & P. 575; *Ry. & M.* 193; *Bevan v. Waters*, 3 Car. & P. 520; *Judson v. Etheridge*, 1 Crompt. & M. 743; *Jackson v. Cummins*, 5 Mee. & W. 342. And see *Jacobs v. Latour*, 5 Bing. 130; 2 Moore & P. 201; *Sanderson v. Bell*, 2 Crompt. & M. 304; *Scarfe v. Morgan*, 4 Mee. & W. 270. It will be seen from the cases which have been mentioned, that a distinction, in relation to the question of lien, has been taken between the mare-keeper and the trainer of a horse; and it is said that the latter has a lien, because he has done something for the improvement of the animal. And in *Judson v. Etheridge*, it was suggested by Bolland, B., that the doctrine might, perhaps, be extended to the case of a breaker who takes a young horse to be broken, on the ground that he makes it a different animal from what it was before, and improves the animal by the application of labor and skill. On

the same principle it has been held, that if a farmer or stable-keeper receive a mare for the purpose of being covered by his stallion, he has a specific lien for the charge of covering. Whether these distinctions were well taken or not, they show that the courts have steadily adhered to the rule that one who merely provides food and takes the care of an animal, as an agister or livery-stable keeper, has no lien except by contract.

There is a further reason why there can be no lien in these cases. When horses are kept at livery, the owner takes and uses them at pleasure, and the bailee only has a lien so long as he retains the uninterrupted possession. If the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods: *Bevan v. Waters*, 3 Car. & P. 520; *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Stra. 556; *Sweet v. Pym*, 1 East 4. So in the case of milch-cows, the agister has no lien, for the reason that the owner has occasional possession for the purpose of milking them; *Jackson v. Cummins*, 5 Mee. & W. 342; *Cross on Lien*, 25, 36, 332. Now here, from the nature of the case, the plaintiff was not to have the continued and exclusive possession of the horses, but Tyler was at liberty to take and use them when he pleased, and he did in fact take them at pleasure. The witness says he does not know that the plaintiff was at home when Tyler took the horses, but there was no pretense that they were taken by fraud, or against the will of the plaintiff.

The plaintiff can not stand upon any better footing than a livery-stable keeper, and as such he had no lien.

Judgment affirmed.

41. BURDICT V. MURRAY,

3 Vt. 302; 21 Am. D. 588. 1830.

Trespass for taking and carrying away sheep and goat skins delivered to plaintiffs to be dressed into morocco. Before the work was completed the owners turned the skins over to the defendant, a creditor, who caused them to be attached. Verdict directed for plaintiff. Defendants excepted.

By Court, PRENTISS, C. J. It is the better opinion that he who has a special property in goods may have an action of trespass against him who has the general property, and upon the evidence the damage shall be mitigated. Thus a bailee of a chattel for a certain time, coupled with an interest, may support the action against the bailor for taking it away before the time:

1 Chit. Pl. 170. There is no doubt, therefore, but that the plaintiffs in the case before us, if they had a special property in the skins, were entitled to maintain this action, and recover according to their interest, although the skins were turned out to the defendants, on the writ of attachment, by Allen and Warren Murray, the owners.

The plaintiffs, under the contract with the Murrays, were bailees having an interest, and had a right to retain the skins for the purpose for which they were bailed to them. Until the skins were dressed and made into morocco, the plaintiffs were entitled to the possession of them; and even then they would have a lien upon the skins for the price agreed to be paid for their labor upon them. A workman who has bestowed his labor upon a chattel has a lien for the remuneration due to him, whether the amount was fixed by the express agreement of the parties or not; though it is otherwise if, by the bargain, a future day of payment was agreed upon, for then the detention of the chattel would be inconsistent with the terms of the contract: *Chase v. Westmore*, 5 Mau. & Sel. 180. Here there was no particular time or mode of payment agreed upon, and if the plaintiffs had completed the manufacture of the skins according to the agreement, they would have had an unquestionable right to detain them until the price was paid, unless they had already in their hands a balance sufficient to pay the price. But the skins were in an unfinished state, and the plaintiffs had a right, under the contract, to retain them to earn the price. If at the time of taking the skins the Murrays had offered and agreed to allow the plaintiffs the full price stipulated to be paid for furnishing them, out of moneys actually in the plaintiffs' hands sufficient to pay the price, it might have been a good defense. But as no such offer appears to have been made, the evidence proposed by the defendants could not avail them.

Judgment affirmed.

42. STEINMAN V. WILKINS,

7 Watts and S. (Pa.) 466; 42 Am. D. 254. 1844.

Trover for conversion of goods stored with defendant as warehouseman by plaintiff's assignors. Demand for the goods had been made, but no tender of charges. Verdict for defendant.

By Court, GIBSON, C. J. Though a plurality of the barons in *Rex. v. Humphery*, 1 McCle. & Yo. 194, 195, dissented from the

dictum of Baron Graham, that a warehouseman has a lien for a general balance, like a wharfinger, I do not understand them to have intimated that he has no lien at all. They spoke of it as an entity; and seem to have admitted that he has a specific lien, though not a general one. There is a well-known distinction between a commercial lien, which is the creature of usage, and a common law lien, which is the creature of policy. The first gives a right to retain for a balance of account; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law; and for that reason it would be impossible to maintain the position of Baron Graham, for there is no evidence of usage as a foundation for it, and no text-writer has treated a warehouse room as a subject of lien in any shape. In *Rex v. Humphery*, it was involved in the discussion only incidentally; and I have met with it in no other case. But there is doubtless a specific lien provided for it by the justice of the common law. From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet, in the recent case of *Jackson v. Cummins*, 5 *Mee. & W.* 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position, that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters*, *Moo. & M.* 235, in which a trainer was allowed to retain for fitting a race-horse for the turf.

In *Jackson v. Cummins* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Scarfe v. Morgan*, 4 *Mee. & W.* 270, the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow

confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and conveniences of the world. Before *Chase v. Westmore*, 5 Mau. & Sel. 180, there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case, Lord Ellenborough, alluding to the old decisions, said that if they "are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;" and Chief Justice Best declared in *Jacobs v. Latour*, 5 Bing. 132, that the doctrine of lien is so just between debtor and creditor, that it can not be too much favored. In *Kirkman v. Shawcross*, 6 T. R. 17, Lord Kenyon said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it. What rule forbids the lien of a warehouseman? Lord Ellenborough thought in *Chase v. Westmore*, *supra*, that every case of the sort was that of a sale of services performed in relation to a chattel, and to be paid for, as in the case of any other sale, when the article should be delivered. Now, a sale of warehouse room presents a case which is bound by no pre-established rule or analogy; and, on the ground of principle, it is not easy to discover why the warehouseman should not have the same lien for the price of future delivery and intermediate care that a carrier has. The one delivers at a different time, the other at a different place; the one after custody in a warehouse, the other in a vehicle; and that is all the difference.

True, the measure of the carrier's responsibility is greater; but that, though a consideration to influence the *quantum* of his compensation, is not a consideration to increase the number of his securities for it. His lien does not stand on that. He is bound in England by the custom of the realm to carry for all employers at established prices; but it is by no means certain that our ancestors brought the principle with them from the parent country as one suited to their condition in the wilderness. We have no trace of an action for refusing to carry; and it is notorious, that the wagoners who were formerly the carriers between Philadelphia and Pittsburgh, frequently refused to load at the current price. Now, neither the carrier nor the warehouseman adds a particle to the intrinsic value of the thing. The one delivers at the place, and the other at the time, that suits the interest or the convenience of the owner of it, in whose estimation it receives an increase of its relative value from the services

rendered in respect of it, else he would not have undertaken to pay for them. I take it, then, that, in regard to lien, a warehouseman stands on a footing with a carrier, whom in this country he closely resembles.

Now, it is clear from *Sodergren v. Flight and Jennings*, cited 6 East, 612, that where the ownership is entire in the consignee, or a purchaser from him, each parcel of the goods is bound, not only for its particular proportion, but for the whole, provided the whole has been carried under one contract; it is otherwise where to charge a part for the whole would subject a purchaser to answer for the goods of another, delivered by the bailee with knowledge of the circumstances. In this instance, the entire interest was in Hamilton & Humes, in whose right the plaintiff sues; and the principle laid down by the presiding judge was substantially right. On the other hand, the full benefit of it was not given to the defendant in charging that the demand and refusal was evidence of conversion. There was no evidence of tender to make the detention wrongful; and the defendant would have had cause to complain, had the verdict been against him, of the direction to deduct the entire price of the storage from the value of the articles returned, and to find for the plaintiff a sum equal to the difference. But there has been no error which the plaintiff can assign.

Judgment affirmed.

43. SCHMIDT V. BLOOD,

9 Wend. (N. Y.) 268; 24 Am. D. 143. 1832.

Replevin for six and one-half tons of hemp. Ninety-nine tons had been stored with defendants as warehousemen, of which their store-keeper had stolen ten tons. Plaintiffs demanded the balance remaining in store and offered to pay storage on such balance. Defendants refused to deliver until storage on all the hemp stored had been paid. Verdict for plaintiffs, and motion for new trial because of rejection of evidence of care by plaintiff and usage in New York to retain balance as lien for whole storage.

By Court, SUTHERLAND, J. It appears to be well settled that a warehouseman, or depositary of goods for hire, is responsible only for ordinary care, and is not liable for loss arising from accident when he is not in default: 2 Kent Com. 441; 4 T. R. 481; Peake N. P. 114; 4 Esp. N. P. 262; and in *Finucane v.*

Small, 1 Id. 315, it was held that if goods be bailed to be kept for hire, if the compensation be for house room, and not a reward for care and diligence, the bailee is bound only to take the same care of the goods as of his own, and if they be stolen or embezzled by his servant without gross negligence on his part, he is not liable, and the *onus* of showing negligence seems to be upon the plaintiff, unless there is a total default in delivering or accounting for the goods: 7 Cow. 500, note a, and cases there cited: 3 Taunt. 264; 5 Barn. & Cress. 322; 1 H. Bl. 298; Jones on Bailm. 106, n. 40; 2 Salk. 655; 1 T. R. 33. The defendants' claim for storage, therefore, is not prejudiced by the fact that a portion of the goods had been purloined or embezzled by the storekeeper or servant.

The defendants had a lien on the whole and every part of the hemp for their storage of the whole; it was but one parcel; the whole was deposited with them at the same time; it was but one transaction. It is admitted that the defendants might have refused to deliver any portion of the hemp until their storage for that particular portion was paid; but having parted with all but six and a half tons, it is contended that they have no right to retain that for their charges in relation to the other portions. This can not be; it would be found most inconvenient in practice. Restricting the lien to services rendered in relation to the whole quantity deposited at the same time, it becomes a just and reasonable rule, giving effect undoubtedly to the actual intentions and understanding of the parties; and promoting the convenience of trade and business: 2 Kent Com. 495, 496.

New trial granted.

44. WHITLOCK V. HEARD,

13 Ala. 776; 48 Am. D. 73. 1848.

Trover for the conversion of stock which plaintiff left with defendant to keep, with power to sell it to pay for the keeping and a note given to satisfy a gaming debt of plaintiff's. Plaintiff notified defendant not to pay the note. Defendant sold the stocks at public auction, bidding them in himself. The court below ruled that this was not a sale. Plaintiff appealed.

By Court, DARGAN, J. In an action of trover, it is necessary for the plaintiff to show title to the property, an immediate right of possession, and a conversion by the defendant. The

plaintiff's title to the property in this case, was not denied by the charge of the judge, but the charge was calculated to induce the belief, either that there was no conversion shown, or that the plaintiff did not have an immediate right to the possession; hence arises the necessity of examining this question. If one deliver stock, or cattle, to another, to be kept or fed, with the power to sell them to pay for their keep, will trover lie against the party to whom they are so delivered, if he convert the cattle to his own use without tendering pay for keeping them? It is very clear, that if a factor, or other bailee, having a lien on goods, sell them, or convert them to his own use, or destroy the goods, as by drawing out a quantity of wine from a cask, and filling it up with water, that the owner may bring trover immediately, without regard to the lien: See *Nash v. Mosher*, 19 Wend. 431, and the cases there cited. And I think that any act by a lien holder, inconsistent with the character of his possession, and denying the title of the owner, will justify the owner in bringing trover, and that such conduct on the part of the lien holder destroys his lien. See *Samuel v. Morris*, 6 Car. & P. 620.

This view is corroborated by Mr. Chitty, in his work on pleading, page 152. It is there said, that if a person have goods in his possession, on which he has a lien for the payment of a debt, the owner can not bring trover without tendering the money due on the goods. But if the party being applied to for the goods refuses to deliver them for a different reason than that he has a lien on them for his debt, and do not mention his lien, he shall not be permitted to set up his lien afterwards, to defeat the owner in an action of trover. See also *Bac. Abr.*, tit. Trover. Now the reason of this can only be, that one being applied to for the goods, the lien holder repudiated the title of the owner, denied the character of his possession, and consequently there was a clear conversion of the property. Hence, trover would lie. Had there been no express agreement in this case, that the mare and colts should be pledged to pay for keeping them, with the power to sell, if necessary, to pay for their keep, there would be no difficulty; for the conduct of the defendant was such, as would have justified a jury in coming to the conclusion, that he held the property, not in subordination to the title of the owner, but that he had set up his own title as adverse to that of the owner, and by such conduct, his lien would have been no protection to him against this suit. But here there was an express agreement, that the stock should be liable for keeping them, with the power to sell them to pay the

expenses. This is a contract, and is not a new lien, resulting from the rules of law. By the terms of this contract, the defendant had the right to sell so much of the stock as was necessary to pay what might be due to him for keeping them. If one of the horses was enough for this purpose, he should not have sold more—but proceeding to sell all of them, which was not necessary to pay the expense of their keeping, was an assumption of ownership beyond the authority conferred on him by the terms of the contract. The power to sell ceased with the extinguishment of his demand; his debt for keeping the horses being paid, he had no right to sell more, and his doing so was a conversion of that portion of the stock sold by him, which was not necessary to pay the debt due for keeping them. The circuit court therefore erred in refusing to give the charge requested, that the defendant was liable for such of the stock sold, as were not necessary to pay the amount due for keeping them. The view here taken, is sustained by the case of *Roberts v. Beeson*, 4 Port. (Ala.) 164. In that case it was decided, that an action of trespass would lie against a sheriff, who sold more of the defendant's goods than was necessary to pay the execution. So it has been held, that if a sheriff having a *fi. fa.*, for forty shillings, sell five yoke of oxen, one yoke being sufficient to satisfy the *fi. fa.*, he may be considered as a trespasser, and sued as such, for the value of the four. See the case referred to in 4 Port. and 20 Vin. Abr. 458.

The charge of the court as asked, admits the right of the defendant to sell enough to pay his debt, but sought to charge him for the conversion of that portion of the stock, sold after he had raised money enough to extinguish it. The court did not give this charge, because the defendant himself was the purchaser. The sale was at public auction, and the defendant the highest bidder. Such a sale is not absolutely void, but is voidable at the election of the party whose title is sought to be divested by such sale. The court should have given the charge as requested, and for the refusal so to charge, the cause is reversed and remanded.

45. In *Doane v. Russell*, 3 Gray (Mass.) 382, 1855, Chief Justice Shaw said:

We think the rule is generally stated by the text writers, that a party having a lien only, without a power of sale superadded by agreement, cannot lawfully sell the chattel for his reimbursement. It is so stated in 1 Chit. Gen. Pract. 492; and he advises carriers and others, entitled to a lien, to obtain an express stipulation for a power of sale in case the lien is not satisfied. 2 Kent Com. (6th ed.) 642. Cross on Lien, 47. Woolrych

on Com. & Merc. Law, 237. The language of the learned American commentator, in summing up his article on lien, is this: "I will conclude with observing that a lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it."

If it be said that a right to retain the goods, without the right to sell, is of little or no value; it may be answered that it is certainly not so adequate a security as a pledge with a power of sale; still, it is to be considered that both parties have rights which are to be regarded by the law; and the rule must be adapted to general convenience. In the greater number of cases, the lien for work is small in comparison with the value, to the owner, of the article subject to lien; and in most cases it would be for the interest of the owner to satisfy the lien and redeem the goods; as in the case of the tailor, the coachmaker, the innkeeper, the carrier and others. Whereas, many times, it would cause great loss to the general owner to sell the suit of clothes or other articles of personal property. But further, it is to be considered that the security of this lien, such as it is, is superadded to the holder's right to recover for his services by action. And if the transaction be a large one, and of such a character as to require further security, it may be provided for by an express stipulation for a power of sale, under such limitations as the particular circumstances of the case may indicate as suitable to secure the rights of all parties concerned.

46. POTTS V. NEW YORK AND NEW ENGLAND RAIL-ROAD CO.,

131 Mass. 455; 41 Am. R. 247. 1881.

Tort for conversion of coal. Judgment below for defendant.

GRAY, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do. *Sodergren v. Flight*, cited in 6 East, 622; *Abbott on Shipping* (7th ed.), 377; *Lane v. Old Colony R. R.*, 14 Gray, 143; *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104; 35 Am. Rep. 360. And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. *Briggs v. Boston & Lowell R. R.*, 6 Allen, 246, 250, 83 Am. D. 626.

The right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property; but not the possession. *Bloxam v. Sanders*, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406; *Rowley v. Bigelow*, 12 Pick.

307, 313 (23 Am. Dec. 607). This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591. See also, *Butler v. Woolcott*, 2 B. & P. N. R. 64; *Sears v. Wills*, 4 Allen, 212, 216. But the common-law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

Judgment for the defendant.

47. AMERICAN DISTRICT TELEGRAPH CO. V.
WALKER,

72 Md. 454; 20 Atl. R. 1; 20 Am. St. R. 479. 1890.

ALVEY, C. J. This action was brought by the appellee against the appellant to recover for injury to a pair of horses, and to a surrey wagon, a vehicle to which the horses were attached at the time of the accident. The question is, whether the defendant is responsible for the consequences of the accident.

The defendant is a corporation, and it appears that it holds itself out for the undertaking of the performance of various services, such as the carriage of parcels, messages, and other errands and commissions, upon call at district stations in the city. The corporate name of the defendant would not appear to indicate very clearly the nature of the duties that it assumes to perform.

It appears that the plaintiff was the owner of a pair of valuable horses, which he kept at Little's livery-stable, on Howard Street; and having the horses hitched to a surrey wagon hired of the proprietor of the livery-stable, for a drive in the country, upon his return he and his companions stopped at a restaurant on the corner of Calvert and German streets; and desiring to have the horses and vehicle taken to the livery-stable, he went to the nearest district office of the defendant and asked for a boy competent to drive a pair of horses to Little's stable, on Howard Street, and paid the customary charge for a messenger service. The manager of the office responded, and sent a boy to take the team, but on seeing the horses and be-

ing asked if he could drive, the boy said he could not drive a double team, and thereupon he was sent back to the office by the plaintiff, and the latter then determined to wait for the driver from the stable; but before such driver arrived, another boy from the defendant's office called to take the team, who said, in answer to an inquiry, that he had driven a double team before; and the plaintiff gave the horses and vehicle in charge of the boy, and gave him direction as to the course he should take to get to the stable in order best to avoid crowded streets. The boy started off with the team, but on the way to the stable, the horses ran off, threw out the boy, broke up the vehicle, and one of the horses was so seriously injured that he had to be shot, and the other horse was rendered unsafe to drive. There was evidence given tending to show that the running away of the horses was caused by the negligent or unskillful driving of the boy. It would appear that the furnishing of boys to drive teams for customers was part of the ordinary business of the defendant; for Little, the keeper of the livery-stable, testified that the defendant had a call-box in his stable, and that he frequently called messenger-boys of the defendant to drive teams, and they were supplied, and that he settled for such service monthly.

There was evidence offered by the defendant for the purpose of proving previous knowledge on the part of the plaintiff of a limitation as to the extent of damages for which the defendant would contract to be answerable for any injury that might be sustained in the course of its service. Such condition was printed at the foot of its blank delivery tickets. But it was not shown that there was any contract in this case, by ticket or otherwise, containing any such limitation of liability, and the evidence offered was therefore rejected, and we think properly so.

Upon the whole evidence, the court instructed the jury, upon request of the plaintiff, that if they found from the evidence that the defendant undertook, for a reward, to deliver the team of horses and vehicle, as described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking intrusted the driving of the team to one who, by his negligence, permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff was entitled to recover, and the jury should allow such damages as they might find, from the evidence, the plaintiff suffered by reason of the defendant's default in the premises.

The defendant offered six prayers, all of which were rejected by the court. He also moved the court to exclude from the

jury all the evidence on the part of the plaintiff which related to the injury of the surrey wagon, and the expense incurred in repairing the same. And to the refusal of its prayers, and the motion to exclude the evidence, as well as to the instruction given by the court to the jury, the defendant excepted.

This is a case of bailment for hire; but the defendant did not, by its undertaking, incur the liability of a common carrier. This species of bailment is included in what Lord Holt, in the leading case of *Coggs v. Bernard*, 2 Ld. Raym. 917, classifies as the fifth sort, viz., "a delivery to carry or otherwise manage, for a reward to be paid to the bailee," and as to which, said Lord Holt, the cases are of two sorts, "either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events." But as to the second sort he says "they are bailiffs, factors, and such like," in which case the bailee is only bound to take reasonable care; and "the true reason of the case is," says the learned judge, "it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it." And so Judge Story, in his work on bailments, section 457, founding his text principally upon Lord Holt's classification, states the same distinction. He says: "Every such private person is bound to ordinary diligence, and to a reasonable exercise of skill; and of course he is not responsible for any losses not occasioned by the ordinary negligence of himself or his servants. He will not; therefore, be liable for any loss by thieves, or for any taking from him or them by force, or where the owner accompanies the goods to take care of them, and is himself guilty of negligence. This is the general rule; and it of course applies to all cases where he has not assumed the character of a common carrier, unless, indeed, he has expressly, by the terms of his contract, taken upon himself any such risk." The application of the principle of this species of bailment, and the extent of the liability of the bailee, are well explained and illustrated by the cases of *Newton v. Pope*, 1 Cow. 109; *Brind v. Dale*, 8 Car. & P. 207; and *Searle v. Laverick*, L. R. 9 Q. B. 122; and those cases show that if negligence or want of skill in the bailee or his servant be the ground of action, the *onus* of proof is on the plaintiff.

The instruction granted by the court is based exclusively upon the alleged negligence of the boy in driving the horses. There was evidence tending to prove such negligence, and we perceive no error in the instruction. The boy was furnished

from the defendant's office to take charge of and to drive the team of horses to the livery-stable, and having assumed the duty for a reward, the defendant was bound to furnish a driver both competent and careful.

Nor do we perceive that there was any error committed by the court in refusing to exclude from the consideration of the jury the evidence in regard to the damage done to the surrey wagon, and the expense of its repair. It is true, the plaintiff was not the general owner of the wagon, but having hired the vehicle, he was bailee, and as such he had a special property in it, which entitled him to recover for any injury to it, as against a party without title. He was answerable to the general owner, and was therefore entitled to recover of the defendant to the full extent of the injury to the vehicle caused by the negligent act of the defendant's servant: *Harker v. Dement*, 9 Gill, 7, 13; 52 Am. Dec. 670.

With respect to the prayers offered by the defendant, we think there was no error in rejecting them. The instruction actually given by the court was as favorable to the defendant as any that could well have been given, upon the facts of the case, and which instruction rendered it wholly unnecessary to grant the second and third prayers of the defendant; as by the instruction given the defendant was only held to that degree of care to which an ordinary bailee for hire is liable. And as to the other prayers, clearly, in view of what we have said in regard to the nature of the liability of the defendant, there was no error in rejecting them. The judgment must therefore be affirmed.

48. MORNINGSTAR V. CUNNINGHAM,

110 Ind. 328; 11 N. E. R. 593; 59 Am. R. 211. 1886.

Action on a note and mortgage. Defendant, Morningstar, agreed with Henderson, Parks & Co., pork-packers, that if they would advance the money he would buy and deliver to them for slaughter fat hogs. They were to prepare the same for market, sell on defendant's account, reimburse themselves for the money advanced and account to defendant for the balance. They furnished \$25,000, but pork declined so that a sale then would not reimburse them for the money advanced. Accordingly they advised Morningstar to execute to them the note and mortgage in suit, and hold the product for a rise in the market. Morning-

star charged that the packers had confused his product with their own, thus converting his property of a value greater than the amount of the note. To this it was replied that there was no agreement to keep defendant's product separate, that his entire product had been accounted for, and that it fell short by \$10,000 of the amount advanced under the contract. Judgment for plaintiffs for \$8,000.

MITCHELL, J. (After stating the facts.) During the progress of the trial the plaintiffs were permitted to prove that according to the usual course of business, it was and always had been the usage of the packing house of Henderson, Parks & Co. to retain certain portions of hogs packed by them, such as the bristles, feet, fat from the entrails, and other offal, as compensation for slaughtering and cleaning the hogs, and placing them upon the hooks to cool, and afterward cutting them up.

Evidence was also given over objection, tending to prove that the usage above mentioned was the common usage prevalent in other similar packing houses in the State of Indiana, and that the retention of the offal was but reasonable compensation.

The plaintiff also offered evidence tending to prove that the term "product" as applied to the pork-packing business, had a known meaning peculiar to the trade, and did not include such parts of slaughtered hogs as are mentioned above. Other evidence involving similar principles was admitted.

It is to be observed that the contract, out of which the controversy arose, was oral, and the evidence was such as to leave the terms and meaning of the agreement ambiguous. In such cases, evidence of the known and usual course of a particular trade or business is competent, with a view of raising a presumption that the transaction in question was according to the ordinary and usual course of the business to which it related. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. R. 311; *Mand v. Trail*, 92 Ind. 521, 47 Am. Rep. 163; *Wallace v. Morgan*, 23 Ind. 399; *Lonergan v. Stewart*, 55 Ill. 44; *Jonsson v. Thompson*, 97 N. Y. 642.

It is not essential that such a usage should be shown to be so ancient "that the memory of man runneth not to the contrary," nor that it should contain all the other elements of a common-law custom, as defined in the books. 1 Cooley Bl. Com. 76, and note.

The distinction between a usage of trade and a common-law custom has not always been observed. A custom is something which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to

the subject-matter to which it relates, and is ordinarily taken notice of without proof. Thus when a payee indorses his name on the back of a promissory note, the law by force of a pervading and universal custom, imports a well-recognized contract into the transaction. *Smythe v. Scott*, 106 Ind. 245, 6 N. E. R. 145; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Hursh v. North*, 40 Penn. St. 241; *Munn v. Burch*, 25 Ill. 21.

Many other examples of such customs might be given. They are distinguishable from a usage, such as concerns us here. Where a usage in a particular trade or business is known, uniform, reasonable, and not contrary to law, or opposed to public policy, evidence of such usage may be considered in ascertaining the otherwise uncertain meaning of a contract, unless the proof of such usage contradicts the express terms of the agreement. This is so even though the usage be that of a particular person, provided it be known to the parties concerned, or provided it has been so long continued, or has become so generally known and notorious in the place or neighborhood, as to justify the presumption that it must have been known to the parties. *Carter v. Philadelphia Coal Co.*, 77 Penn. St. 286; *Townsend v. Whitby*, 5 Harr. (Del.) 55; *McMasters v. Pennsylvania R. Co.*, 69 Penn. St. 374, 8 Am. Rep. 264; *Lawson Usages*, 40.

Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may therefore in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business, as ordinary incidents thereto. *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277; *Florence Machine Co. v. Dagget*, 135 Mass. 582; *Fitzimmons v. Academy, etc.*, 81 Mo. 37; *Cooper v. Kane*, 19 Wend. 386, 32 Am. Dec. 512; *Kelton v. Taylor*, 11 Lea, 264, 47 Am. Rep. 284; 7 Cent. L. J. 383.

Thus where it was the uniform usage of a firm to extend a definite credit, on the sale of goods, it was held competent, in order to avoid the statute of limitations, to prove such usage, and that the purchaser knew it. *Hursh v. North*, *supra*. So in *Walls v. Bailey*, *supra*, it was held competent to show the usage of plasterers in a particular place, in order to determine the method of measuring plastering done under a contract which stipulated that a certain price per yard should be paid. See also *Lowe v. Lerman*, 15 Ohio St. 179; *Hinton v. Locke*, 5 Hill, 437;

Barton v. McKelway, 2 Zab. (22 N. J.) 165; Ford v. Tirrell, 9 Gray, 401, 69 Am. Dec. 297.

In like manner it is competent to prove that the words in which a contract is expressed, as respects the particular trade or business to which it refers, are used in a peculiar sense, and different from their ordinary import. Jaqua v. Witham, etc., Co., 106 Ind. 545 7 N. E. R. 314; Spartali v. Benecke, 10 C. B. 212.

The evidence, the admission of which is complained of, was not admitted for the purpose of showing a custom in the technical sense, but to show the general course and usage of the business, as it was conducted by Henderson, Parks & Co. and others, so as to authorize the presumption, in the absence of a special contract, that the transaction in question was according to the usual course of the business to which it referred.

There was evidence tending to show that the defendant had knowledge of the usage in question, that he had dealt with the firm of Henderson, Parks & Co., in respect to packing and slaughtering hogs before. It was also shown that the usage was reasonable, and that it had been adopted generally by packing houses, as the only practical method of conducting the business.

Where the only practical method of conducting a business, such as receiving and storing wheat, and other articles of commerce, is to render to each bailor the amount of goods stored, in kind and quality, it is not a conversion of the goods bailed, if the bailee treat them according to the known and usual method of conducting such business. To constitute a conversion, the bailee's dealing with the property must have been wholly inconsistent with the contract under which he had the limited interest. Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. R. 585; Pollock Torts, 296.

It was competent therefore in the absence of an agreement to the contrary, to show that according to the course of business at their pork-house, Henderson, Parks & Co. did not keep the product of each customer's hogs separate, but that they accounted in kind, quantity and quality to each, according to known, reasonable and recognized rules.

The other evidence in respect to the usage, in pursuance of which certain offal was retained as compensation, was also properly admitted.

The judgment is affirmed, with costs.

49. SHAW V. RAILROAD CO.,

101 U. S. 557. 1879.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for \$11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of \$8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft. Judgment for plaintiff.

STRONG, J. The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from S. Louis to Philadelphia, the endorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of \$8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What

is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the right of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any

person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instrument in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, endorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of *mala fides* will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. *Goodman v. Harvey*, 4 Ad. & E. 870; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Matthews v. Poythress*, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (*Miller v. Race*, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in *Peacock v. Rhodes* (2 Doug. 633) to bills and notes as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him

from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in *Goodman v. Harvey*, *Goodman v. Simonds*, *Murray v. Lardner* (*supra*), and in *Phelan v. Moss* (67 Pa. St. 59, 5 Am. R. 402), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstand-

ing draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

(Omitting some minor considerations.) Judgment affirmed.

PART III

OF EXTRAORDINARY BAILMENTS

CHAPTER IX.

OF INNS AND INNKEEPERS.

50. KISTEN V. HILDEBRAND.

9 B. Monroe (Ky.) 72; 48 Am. D. 416. 1848.

Case, against defendant as an innkeeper. Verdict for plaintiff. Error sued out by defendant.

By Court, MARSHALL, C. J. This action on the case was brought to recover from Kisten, as an innkeeper, a large sum of money alleged to have been taken, through the default and negligence of the defendant, his servants, etc., from the trunk of the plaintiff, in the inn of the defendant, he, the plaintiff, being then a guest therein. The form of proceeding against innkeepers in England, upon the custom of the realm, seems to have been substantially pursued. The declaration sets out as the foundation of the action, that "by the custom and law of this commonwealth, innkeepers who keep common inns for entertaining men traveling through those parts where those inns are, and in the same abiding their goods and chattels and money, within those inns being, are bound to keep, day and night, without diminution or loss, so that through the default of the said innkeepers, or their servants, damage to such guests might not, in any manner, happen," etc., and alleges that through the default of the defendant and his servants, the money was taken and carried away by certain malefactors. A demurrer to the declaration was overruled, and a trial being had on the plea of not guilty, filed with the demurrer, a verdict for three hundred dollars was found against the defendant, who prosecutes this writ of error for the reversal of the judgment rendered upon it.

As the custom of the realm of England, with regard to inns and innkeepers, and the liability of the latter, was a general custom, and therefore, a part of the common law, we assume

that so far as it is applicable and not inconsistent with our own local laws and usages, it is also a part of the common law of this state. Under this assumption we are of opinion that taking into view the preamble to the declaration, in which the defendant is charged to be an innkeeper, a cause of action under the law set forth, is substantially shown. The demurrer to the declaration was, therefore, properly overruled—and we only remark further, that it is no more necessary in this than in other cases, to set out the law of the land on which the action is founded. The law with regard to the liability of innkeepers being one of extreme rigor, it is essential to the safety of all persons who may be engaged in the business of entertaining others in their houses for reward, that the extent of its application should be clearly defined, and that it should not be carried beyond its proper limits. An innkeeper is *prima facie* liable for all losses which happen to the goods of his guests in his inn, all such being attributed to him on the ground of public policy, and the confidence necessarily reposed in him, and on account of the difficulty of proving actual negligence. But he is not liable if the loss be occasioned by external force or robbery—or if it be attributable to the neglect of the guest, or to the act of his servant or companion. This being the extent of his liability to his guests, it is important to determine who is an innkeeper, and who may claim the benefit of this liability.

It was laid down in Calye's Case, 8 Co. 32, that common inns were instituted for passengers and wayfaring men. And we think it will be found that the great liability imposed upon them, is for the benefit of travelers and transient persons, who are often compelled to resort to inns for shelter and entertainment, without the means of knowing the character of the host; and without the opportunity of securing themselves, against loss or damage to their goods. A common innkeeper is defined to be "a person who makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them, and their horses, and attendants:" Bacon's Abr., Inns and Innkeepers, B; Story on Bail., sec. 475. But it has been decided that a man may be an innkeeper, and liable as such, though he have no provision for horses. It is not necessary that he should have a sign indicating that he is an innkeeper, but it must be his business to entertain travelers and passengers. His duty extends chiefly to the entertaining and harboring of travelers, etc., and therefore, if one who keeps a common inn refuses to receive a traveler, or to find him in victuals, etc., for a reasonable price (without good excuse, as that his house is full), he is liable not only to a civil action, but to an indictment. For hav-

ing taken upon himself a public employment, he must serve the public to the extent of that employment: Bacon's Abr., Inns and Innkeepers, c. 1.

One who lodges and entertains strangers at a watering place, who come to drink the waters, if he entertain no others, is not thereby an innkeeper: Bacon's Abr., Inns and Innkeepers, B. So the keeper of a coffee-house, or a boarding-house, is not as such an innkeeper: Story on Bail., sec. 475. It must be a house kept open publicly for the lodging and entertainment of travelers in general for a reasonable compensation: 2 Kent's Com. 595. And although the house be an inn, and the keeper an innkeeper, it does not follow that he is under the same liability to all persons who may be staying at the inn with their goods. The length of time that a man stays at an inn does not make the difference, "though he stays a week, or a month or more, so always though not strictly *transeuns*, he retains his character as a traveler:" Story on Bail., sec. 177; Bacon's Abr., Inns and Innkeepers, c. 5. "But if a person comes upon a special contract to board and sojourn at the inn, he is not in the sense of the law a guest, but a boarder:" Same authorities.

We greatly doubt whether the evidence in this case is sufficient to authorize the conclusion that the defendant was an innkeeper, or that professedly, or in point of fact, he had assumed the business of receiving and entertaining the traveling public generally, or that his character or business or employment was such as to preclude him from refusing to receive and entertain any person at his own pleasure, or to render him liable either to an action or an indictment for such refusal, as the keeper of a common inn may have inmates of his house for a reward, to whom he may not be under the strict liability of an innkeeper; so may the keeper of a boarding-house occasionally entertain transient persons without acquiring the character, or being under the responsibilities of an innkeeper. And certainly a man professing to be the keeper of a boarding-house, or a licensed coffee-house, is not, though he also entertain travelers, liable to his boarders as an innkeeper is liable to his traveling guests. Conceding then, that the evidence authorized the jury to find that the defendant was an innkeeper, because he occasionally entertained travelers, it is also certain that his professed and ordinary business was that of the keeper of a coffee-house and boarding-house. And although the evidence is not very explicit with regard to the character in which the plaintiff was an inmate of the house, we think it was sufficient to authorize the jury to infer that he was there as a boarder, and not as a traveler or temporary trader. And as the instructions of the court sub-

mitted to the jury as the decisive question, the single inquiry whether the defendant was an innkeeper or not, and sustained, or rather required a verdict against him if he was so found to be, we think it was erroneous in withdrawing from the jury the question whether the plaintiff was a guest entitled to the benefit of the extreme liability imposed upon an innkeeper in favor of travelers, or whether he was a mere boarder.

The instructions also assume that the plaintiff's money was taken in defendant's house, which should have been left to the jury, although this assumption is perhaps sufficiently authorized by the evidence, and would not be deemed a ground of reversal. We are also of opinion that the definition of an innkeeper, given to the jury, though correct, should have been more explicit; and that, as the court told the jury, that the calling of a house a coffee-house or a boarding-house, did not change the liability of the defendant if he was an innkeeper, they should also have been told, that the occasional entertainment of travelers did not make a boarding-house or a coffee-house, a common inn, and that if the plaintiff was a boarder and not a traveler, he could not recover upon the general liability of an innkeeper. The court having undertaken, on its own motion, to state the law to the jury, should have stated the law as applicable to the whole case, leaving to them the decision of all questions of fact arising on the evidence. And as the court had not stated the liability of an innkeeper, we think the incorrect statement of the plaintiff's counsel, in his concluding argument to the jury, should have been corrected at the request of the defendant's counsel.

Wherefore the judgment is reversed, and the case remanded for a new trial in conformity with this opinion.

51. MOWERS V. FETHERS,

61 N. Y. 34; 19 Am. R. 244. 1874.

Action for value of a stallion, harness and wagon, destroyed by fire while in the barn of an innkeeper. The owner of the stallion contracted for a stall in defendant's barn, feed for the horse and board for himself on certain days each week. The horse stood at the barn on these days to serve such mares as might be brought. On a charge that the relation of innkeeper and guest was established the court below directed a verdict for plaintiff, which was affirmed at the General Term. Defendant appealed.

REYNOLDS, C. An innkeeper at common law has been said

to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. 5 Bacon's Abr., Inns, etc., 228; Story on Bailments, § 475. The person or persons undertaking this public employment were bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any possibility they could be accommodated, and the innkeeper was bound to guard the goods of his guests with proper diligence. 5 Term R. 274; 2 Barn. & Ad. 285; 1 Carr. & K. 404; 7 Carr. & P. 213; 4 Exch. 367. The common-law rule has been generally followed by the courts in this country save so far as it has been modified by statute. The duties, rights and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common-law liability of an innkeeper, the technical relation of guest and innkeeper must be established, and the question is, whether it existed in the present case. I think it did not, for reasons now to be suggested.

It seems to be apparent from the nature of the duties and obligations of the keeper of a common or public inn, that he is not, in his capacity of innkeeper, bound to receive or furnish accommodations for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses.

He is doubtless bound to receive and entertain a strolling pedler, and securely guard his pack of trinkets if brought *infra hospitium*, so long as he remains a mere guest. So, also, would he be bound to receive and entertain a wayfarer, incumbered with a stallion, but under no obligation as an innkeeper to allow his curtilage to be turned into an asylum for the breeding of horses. It is very manifest in this case that the sojourn of the plaintiff Eggner, with the horse, at the defendant's inn, was not that of an ordinary traveler. The purpose and object was entirely different, and the defendant, as an innkeeper, was under no common-law obligation to receive and entertain the plaintiff Eggner and his horse for such a purpose, and where he is not bound to receive and entertain the person as his guest, the strict rule of common-law liability for the preservation of his property does not obtain. The obligation to respond for injury to property depends upon his duty to receive and entertain as an innkeeper, and they must stand or fall together. Grinnell v. Cook, 3 Hill, 485, 38 Am. D. 663; Ingalsbee v. Wood, 36 Barb. 455, 33 N. Y. 577, 88 Am. D. 409; Hulett v. Swift, id. 571, 88 Am. D. 405. The arrangement by which the plaintiff Eggner, with his horse, occupied the premises of the defendant

two days in each week, was made beforehand, and was to continue during the season, for serving mares that should be brought to the inclosure. The stall that the horse was to occupy was selected, and some other conveniences incident to the business to be carried on were also provided for. The plaintiff Eggner was himself to groom and take care of the horse, and when occupying the stall selected for his accommodation he had it under a lock and key of his own. The price of oats for the horse and of meals for Eggner was fixed at prices less than charged ordinary travelers. Under this condition of facts it appears obvious that Eggner did not come for entertainment at the defendant's inn as an ordinary wayfarer, but under a special arrangement previously made. In such case the utmost limits of the defendant's liability was that of an ordinary bailee for hire.

The case of *Washburn v. Jones*, 14 Barb. 193, has no analogy to this. There the defendant was made liable for negligence in fact in the construction of the stall, by reason of which the horse received the injury, and that liability would follow if he was to be regarded merely as an ordinary bailee.

In the case at bar, I think, there should be a new trial.

LOTT, Ch. C., and GRAY, C., concur.

EARL and DWIGHT, CC., dissent.

Judgment reversed, and new trial ordered.

52. FAY V. PACIFIC IMPROVEMENT CO.,

93 Cal. 253; 26 Pac. R. 1099; 28 Pac. R. 943; 27 Am. St. R. 198. 1892.

Action against an innkeeper for damages to jewelry by fire.

The COURT. Upon further consideration of this cause, after hearing in Bank, we are satisfied with the conclusion reached in Department, and with the opinion there rendered, and for the reasons stated in said opinion the judgment and order appealed from are affirmed.

The following is the opinion of Department Two, above referred to, rendered on the 23d of June, 1891:—

DE HAVEN, J. The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property needed for her personal use, consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor.

The court below found that the Hotel Del Monte was, at the date named, a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause, for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—a hotel. In *Wintemute v. Clark*, 5 Sand. 247, an inn is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in *Pinkerton v. Woodward*, 33 Cal. 596; 91 Am. Dec. 657. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in *Schouler on Bailments*: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode": *Schouler on Bailments*, 253.

We think the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper: *Krohn v. Sweeny*, 2 Daly, 200. Nor was the force of this evidence in any wise modified by the fact that the hotel was not

immediately upon a highway, or that the grounds upon which it stood were inclosed and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it.

“Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn, the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment”: Schouler on Bailments, 249.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board is not sufficient of itself to show that she was not received as a guest: *Pinkerton v. Woodward*, 33 Cal. 597; 91 Am. Dec. 657; *Hancock v. Rand*, 94 N. Y. 1; 46 Am. Rep. 112; *Jalie v. Cardinal*, 35 Wis. 118; *Hall v. Pike*, 100 Mass. 495; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417.

The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest: *Hall v. Pike*, 100 Mass. 495. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the East. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, “unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.”

In this case, the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown, further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts, the defendant is liable: *Hulett v. Swift*, 33 N. Y. 571; 88 Am. Dec. 405. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ: 1 Am. & Eng. Ency. of Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency: *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Chicago etc. R. R. Co. v. Sawyer*, 69 Ill. 285; 18 Am. Rep. 613.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper, in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession.

"The guest may retain personal custody of his goods within the inn,—as of his trunk and its contents, his wearing apparel, and other articles in his room, and any jewelry or valuables carried or worn around his person,—without discharging the innkeeper from responsibility"; *Jalie v. Cardinal*, 35 Wis. 126.

We have examined the other points made by appellant, but do not think they call for special discussion.

The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability in this respect is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.

53. PULLMAN PALACE CAR CO. V. SMITH,

73 Ill. 360; 24 Am. R. 258. 1874.

Smith bought of defendant car company a sleeping car ticket from Chicago to St. Louis. During the trip \$1,180 was stolen from his pocket. The court below instructed the jury that, if they found that plaintiff while sleeping in defendant's car on the trip was robbed as charged, they should find a verdict for him in such sum as they considered an ordinary and reasonable sum for a traveler to carry, for traveling purposes only, upon such a journey, with interest at six per cent for fourteen months. Verdict of \$277 for plaintiff.

SHELDON, J. The instruction which the court gave to the jury made the company responsible as insurer for the safety of the money, imposing upon it the severe liability of an innkeeper or common carrier. And it is the position which appellee's counsel take, that the relation between the parties in this case was that of innkeeper and guest, and that the liability of the company is that of an innkeeper.

In order to ascertain whether the extraordinary responsibility claimed here exists, it becomes important to inquire into the nature of inns and guests, where this liability was imposed by the common law, and see whether the description of the same property applies here.

Kent, in defining an inn, says: "It must a be house kept open publicly for the lodging and entertainment of travelers in general, for reasonable consideration. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn." 2 Kent's Com. 595. This is substantially the same definition as is given in all the books upon the subject.

But the keeper of a mere coffee-house, or private boarding or lodging-house, is not an innkeeper, in the sense of the law. *Id.* 596; *Dansey v. Richardson*, 3 Ellis & B. 144; *E. C. L.* vol. 77; *Holder v. Soulby*, 98 *E. C. L.* 254; *Kisten v. Hildebrand*, 9 *B. Monr.* 72, 48 *Am. D.* 416. It must be a common inn, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons who are lodgers. *Story on Bailm.* § 475, and cases cited in note. The duty of innkeepers extends chiefly to the entertaining and harboring of travelers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if one who keeps a com-

mon inn refuses either to receive a traveler as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 3 Bac. Abr., Inns and Innkeepers, C. The custody of the goods of his guest is part and parcel of the innkeeper's contract to feed, lodge and accommodate the guest for a suitable reward. 2 Kent's Com. 592.

From the authorities already cited, it is manifest that this Pullman palace car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company, that of an innkeeper.

It does not, like the innkeeper, undertake to accommodate the traveling public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class, those who have already paid their fare and are provided with a first-class ticket, entitling them to ride to a particular place.

It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is a dining car attached to the train, as shown, but not owned by the Pullman company, nor run by them. It belongs to another company, the Chicago and Alton Dining Car Association. Appellant, as we understand, furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. We would not have it implied, however, that even were these eating accommodations furnished by appellant, it would vary our decision; but the not furnishing entertainment is a lack of one of the features of an inn.

The innkeeper is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey. Appellant does not receive pay for, nor undertake to care for, any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made.

The same necessity does not exist here, as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But here, the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car; and there were easy methods

within his reach by which both money and baggage could be safely transported. On the train which bore him were a baggage and express car, and there was no necessity of imposing this duty and liability on appellant.

It cannot be supposed that any such measure of duty or liability attached to appellant, as is declared in the quotation cited from Bacon's Abridgement to belong to an innkeeper. The accommodation furnished appellee was in accordance with an express contract entered into when he bought his berth ticket at Chicago, which was for the use of a specified couch from Chicago to St. Louis, and appellant did not render a service made mandatory by law, as in the case of an innkeeper.

But if it should be deemed that, on principle merely, this company would be required to take as much care of the goods of a lodger, as an innkeeper of those of a guest, the same may be said with reference to the keeper of a boarding-house, or of a lodging-house. In *Dansey v. Richardson*, *supra*, where the innkeeper's liability was refused to be extended to a boarding-house keeper, it was said by COLERIDGE, J.: "The liability of the innkeeper, as, indeed, other incidents to his position, do not, however, stand on mere reason, but on custom, growing out of a state of society no longer existing." In *Holder v. Toulby*, *supra*, where it was held the law imposed no duty upon a lodging-house keeper to take due care of the goods of a lodger, Calye's case, 8 Co. Rep. 32, was designated as *fons juris* upon this subject, where it was expressly resolved, that, though an innkeeper is responsible for the safety of the goods of a guest, a lodging-house keeper is not. And in *Parker v. Flint*, 12 Mod. 255, "if," says Lord HOLT, "one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection; but if he eat or drink there, it is otherwise, or if he pay for his diet there, though he do not take it there."

The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company; and if appellant were a carrier, it would not be liable for the loss in this case, because the money was not delivered into the possession or custody of appellant, which would be essential to its liability as carrier. *Tower v. The Utica and Schenectady Railroad Co.*, 7 Hill, 47, 42 Am. D. 36. In *Redf. Am. Railw. Cases*, 138, it is said: "But it has never been claimed that the

passenger carrier is responsible for the acts of pickpockets at their stations, or upon steamboats and railway carriages.”

It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses through collusion, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe-keeping by himself, and we think his must be the responsibility for its loss.

We hold the instruction to be erroneous, and the judgment of the court below will be reversed, and the cause remanded.

Judgment reversed.

54. BLUM V. SOUTHERN PULLMAN PALACE CAR CO.,

1 Flippin (U. S. Circuit Court) 500. 1876.

Charge of the court delivered by BROWN, J.—

Gentleman of the jury: This is an action to recover of the defendant the sum of \$3,135, lost by the plaintiff while riding upon a sleeping car owned and controlled by the defendant.

The plaintiff left Cairo, in the State of Illinois, about five o'clock in the evening of March 28, 1873, taking the boat down the river to Columbus, Kentucky. On the boat, he purchased a through ticket by rail from Columbus to Memphis, and, shortly after midnight, entered the sleeping car of the defendant at Humboldt, Tennessee, in which he was assigned a lower berth in the section nearest the front end of the car. He disrobed himself of his outer garments, placed his waistcoat, in an inside pocket of which was a wallet containing the money in question, under his pillow, lay down and went to sleep. The train arrived at Memphis between three and four in the morning, but the plaintiff did not rise, except for a temporary purpose hereafter explained, until about seven o'clock. Meanwhile, the other passengers had all left the car. A conductor and porter employed by the defendant had charge of the car, to which the conductor and brakemen of the train also had access for the purpose of collecting fares and regulating its movements. Prior to entering his berth, plaintiff paid the conductor of the car \$2, for his lodging, and at the same time handed him his through ticket to Memphis to be delivered to the conductor of the train. In rising to dress himself, the plaintiff found his waistcoat and

money were missing. The important question of law is presented as to the measure of defendant's liability.

The first count in the declaration charges defendant with the responsibility of a common carrier, but there is no evidence to support it, and it was virtually abandoned upon the argument. The contract of carriage was with the railroad company. It received the ticket of the plaintiff, offered him accommodation in its passenger car, and was ready to receive his luggage in another car adapted to that purpose. It drew the sleeping car of the defendant, collected fares of its passengers, controlled its movements and provided for its safety. Plaintiff's contract with the railroad company was entirely distinct from that with the defendant.

It is strenuously insisted by plaintiff's counsel, however, the defendant should be held to the responsibility of an inn-keeper. If the liability of an inn-keeper at common law does not extend to all losses of his guests not caused by an act of God, the public enemies or the negligence of the guest himself, as held by the older authorities, he is at least presumptively responsible for all injuries happening to the goods of his guests entrusted to his care, and can only exonerate himself by showing that he did all to ensure their safety which it was in his power to do, and that no default is attributable to his servants or guests. In regard to goods stolen from his custody, without evidence to show how, or by whom, it was done, his liability is the same as that of a carrier. It is admitted that if the defendant is held as an inn-keeper, it is liable for the loss of the money in question. The plaintiff's counsel have produced no case directly in point, nor has the defendant produced any authorities determining definitely the scope of liability in such cases, although the Supreme Court of Illinois has recently decided that the responsibility of a sleeping car company is not that of an inn-keeper. The analogy is certainly a strong one between the hotel and sleeping car. The passenger is invited to undress and go to sleep in a bed provided for that purpose. To accept this invitation his vigilance must be relaxed, and his clothing and purse exposed to thieves. But the rigid responsibility of inn-keepers and carriers at common law was imposed in older and more troublous times, when goods were carried in common wagons, passengers traveled by coach, making frequent stops at houses of public entertainment, whose proprietors frequently colluded with thieves and highwayman to plunder their guests. While the ancient rule is still enforced as against those classes of persons, the tendency of modern legislation and judicial opinion has been to limit it strictly to them. The keeper of a private boarding

or lodging house, or of a restaurant or coffee house is not an inn-keeper in the view of the law, notwithstanding he may furnish lodgings or food, or both, for the entertainment of his guests. It has also been held that the proprietor of a hotel, for summer resort, is not an inn-keeper. Notwithstanding an inn-keeper was responsible for the loss of the horses and carriage of his guest, the keeper of a livery stable is liable only as bailee for negligence. So, also, notwithstanding seeming analogies in their positions, the liability of common carriers has not been extended to warehousemen, wharfingers, telegraph companies or ordinary bailees. In all these cases, except the last, the opportunities for plunder are no less favorable than those of carriers and inn-keepers. The liability of the inn-keeper, indeed, stands less upon reason than upon custom growing out of a state of society no longer existing.

There are good reasons for not extending such liability to the proprietor of a sleeping car.

1st—The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection.

2d—As a compensation for his extraordinary liability, the inn-keeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as inn-keepers are also entitled to pre-payment.

3d—The inn-keeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those.

4th—The inn-keeper is bound to furnish food as well as lodging and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5th—The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain

reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6th—The inn-keeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movements.

7th—The sleeping car can not even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

I hold, therefore, that sleeping car companies are not subject to the responsibility of inn-keepers at common law, and that defendant cannot be held liable upon that ground.

The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is, undoubtedly, the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it can not be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I can not for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants. Defendant's own testimony tends to show a custom on its part to keep a man on watch all night, and to keep the rear door locked. Upon the night in question, however, both the conductor and porter were asleep at the rear end of the car for two or three hours prior to the arrival of the train at Memphis, leaving the front door unlocked and a brakeman sitting in the front end of the car. If you find the loss was occasioned by the negligence of the defendant in this particular, and that the plaintiff himself was guilty of no negligence, you will find for the plaintiff. It is proved, however, that the plaintiff arose once or twice during the night, either before or after the arrival of the train at Memphis,

to get a drink of water at a washstand immediately adjoining his section, but separated from it by a board partition, leaving his waistcoat under his pillow. There is some conflict of evidence as to whether he could see his berth from where he was standing. If you find the plaintiff guilty of negligence in this regard, and that this negligence contributed to his loss, then he is not entitled to recover, notwithstanding the defendant was also guilty of negligence in the particulars above specified.

The measure of damages only remains to be considered. The plaintiff again claims the benefit of the law applicable to innkeepers, and insists upon his right to recover for the entire amount of his loss. The same reasoning would entitle him to recover a fortune if he had seen fit to carry it about his person and lay it under his pillow, and this, too, in the absence of notice to the company. The defendant, however, like a common carrier of passengers, is liable only for such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for his traveling expenses. A man may lawfully carry any sum he chooses about his person, but with the modern facilities for obtaining drafts and sending money by express, it is, to say the least, imprudent to carry a large amount. As defendant received but two dollars for the use of its berth, it would be grossly unjust to mulct it in any sum the plaintiff may choose to swear he has lost, when the charges, simply, of transmitting this amount by express, might have been double or quadruple the price paid for the accommodation. The rule claimed by plaintiff would place carriers and owners of sleeping cars completely at the mercy of unscrupulous and designing men. It was, at least, the duty of the plaintiff to notify the conductor of the amount he carried about him, though even then it is very doubtful whether he could have charged him with the responsibility.

The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of his journey, and all the other circumstances of the case.

The jury returned a verdict for \$100.

55. CLARK V. BURNS,

118 Mass. 275; 19 Am. R. 456. 1875.

Action against defendants, owners of the Cunard line of steamers, as common carriers, also as innkeepers, with counts in tort for negligence. According to the agreed state of facts plaintiff was a first class passenger on defendant's steamer from Liverpool to New York. On retiring to bed he hung his waistcoat, containing in a pocket the watch, on a hook in the state room. According to the rules of the boat the state rooms were not locked, so as to enable the steward to enter to light and put out the lamps. In the morning the watch was missing. The captain and purser were at once notified of the loss, and made a careful but fruitless search. On these facts judgment was ordered for defendants and plaintiff excepted.

GRAY, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Tower v. Utica Railroad*, 7 Hill, 47, 42 Am. D. 36; *Abbott v. Bradstreet*, 55 Me. 530; *Pullman Palace Car Co. v. Smith*, 24 Am. R. 258, 7 Chicago Legal News, 237.

Whether the defendants' regulations as to keeping the doors of the state-rooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. *Fox v. Adams Express Co.*, 116 Mass. 292.

Exceptions overruled.

56. CURTIS V. MURPHY,

63 Wis. 4; 22 N. W. R. 825; 53 Am. R. 242. 1885.

Action against an innkeeper to recover money deposited in the inn safe. Judgment for defendant.

COLE, C. J. The defendant in this action was the proprietor of the St. James hotel in Milwaukee. The plaintiff was a single man, and kept a saloon not many blocks distant from the hotel. The following facts are clearly shown by the plaintiff's own testimony. About twelve o'clock at night on the 13th of March, 1882, the plaintiff came to the hotel with a disreputable woman whom he had met on the street and whose name he did not know, and registered himself and the woman as "Thomas Curtis and wife," called for a room and it was assigned him by a person or clerk who was in charge of the office. The plaintiff testified that before going to his room he said to this clerk that he saw on the top of the register that all moneys and jewels should be given to the proprietor; when the clerk replied that the proprietor was in bed and that he held the position of night clerk. Thereupon the plaintiff handed the clerk \$102 for safe-keeping and took a receipt, which read, "I. O. U. \$102," signed by the clerk. That night the clerk absconded with the money. The plaintiff sues to recover it of the proprietor of the hotel.

The natural, perhaps necessary inference from the plaintiff's own testimony is, that he went to the defendant's hotel at midnight with a prostitute, and engaged a room solely for the purpose of having sexual intercourse with the woman. True, he says that he went to the hotel as a guest and asked the clerk if he "could stay there for bed and breakfast." But he lived near by, gave no reason why he did not go to his usual lodging place, therefore we feel entirely justified in assuming that he went to the hotel for the unlawful purpose above indicated. This being the case the question arises whether he was a guest in a legal sense, and entitled to protection as such. The learned counsel for the defendant insists that he cannot and should not be deemed a guest under the circumstances, and entitled to the rights and privileges of one. If the relation of innkeeper and guest did exist between the parties, it is difficult to perceive upon what ground the defendant can escape the responsibility for the loss of the money handed to the clerk or person in charge of the office; for the common law, as is well known, on grounds of public policy, for the protection of travellers imposes an extraordinary liability on an innkeeper for the goods of his guest, though they may have been lost without his fault.

It is not easy, says Mr. Schouler, to lay down on the whole who should be deemed a guest in the common-law sense; the facts in each case must guide the decision. Bailments, 256. A guest is a "traveller or wayfarer, who puts up at an inn." Calye's case, 8 Coke, 32. "A lodger or stranger in an inn." Jacob's Law Dict. A traveller who comes to an inn and is accepted becomes instantly a guest. Story Bailments, § 477. "It is well settled that if a person goes to an inn as a wayfarer and traveller, and the innkeeper receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them." *Jalie v. Cardinal*, 35 Wis. 118. "The cases show that to entitle one to the privileges and protection of a guest he must have the character of a traveller; one who is a mere temporary lodger, in distinction from one who engages for a fixed period at a certain agreed rate. The main distinction is the fact that one is a wayfarer, or *transiens*, and it matters not how long he remains, provided he assumes this character." *Clute v. Wiggins*, 14 Johns 175, 7 Am. Dec. 448.

In these definitions the prominent idea is that a guest must be a traveller, a wayfarer, or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that a person should have come from a distance to constitute a guest. "Distance is not material. A townsman or neighbor may be a traveller and therefore a guest at an inn as well as he who comes from a distance or from a foreign country." *Walling v. Potter*, 35 Conn. 183. Justice WILDE says, in *Mason v. Thompson*, 9 Pick. 283, 20 Am. Dec. 471, that "it is clearly settled that to constitute a guest in legal contemplation, it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there the innkeeper is chargeable on account of the benefit he is to receive for the keeping of the horse." Judge BRONSON, in commenting on this case in *Grinnell v. Cook*, 3 Hill, 485, 490, 38 Am. Dec. 663, says where the owner of a horse sent the animal to an inn to be kept, but never went there himself, and never intended to go there as a guest, it seemed but little short of downright absurdity to say that in legal contemplation he was a guest. On principle it would seem that a person should himself be either actually or constructively at the inn or hotel for entertainment in order to establish the relation of landlord and guest. In *Atkinson v. Sellers*, 5 C. B. (N. S.) 442, COCKBURN, C. J., remarks: "Of course a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of a journey, whether of business or of pleas-

ure, he is entitled to demand refreshment and the innkeeper is justified in supplying it.”

If a traveller have no personal entertainment or refreshment at an inn, but simply care and food for his horse, he may be a guest, for he makes the inn his temporary abode—his home for the time being. *Ingalsbee v. Wood*, 36 Barb. 452; *Coykendall v. Eaton*, 55 Barb. 188. And while the definition of guest has been somewhat extended from its original meaning, it does not include every one who goes to an inn for convenience to accomplish some purpose. If a man or woman go together or meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travellers and wayfarers, not merely from the negligence, but the dishonesty of innkeepers and their servants, to be extended to such persons? If so, then for a like reason it should protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders. We do not think that the relation of innkeeper and guest can or does arise in the cases supposed. One whose *status* is a guest is a traveller or transient comer who puts up at an inn for a lawful purpose, to receive its customary lodging and entertainment. It is not one who takes a room solely to commit an offense against the laws of the state. So upon the facts detailed by the plaintiff himself, we have no hesitation in saying that he was not a guest at the hotel within the legal sense of the term. The relation of landlord and guest was never established between them.

We feel the more confidence in the correctness of this conclusion when we consider the duties of an innkeeper. An innkeeper is bound to take in all travellers and wayfaring persons and to entertain them if he can accommodate them for a reasonable compensation, and he must guard their goods with proper diligence. *Bac. Abr.*, tit. “Inns and Innkeepers (C.);” *Story Bailm.*, § 476. Now if the defendant had been aware of the purpose of the plaintiff in applying for a room, could he not have refused to receive him into his house? Nay, more; if the plaintiff had been received by the clerk and a room had been assigned him, could not the defendant on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman with him into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plaintiff. But if the plaintiff was a guest and entitled to the rights and

privileges of a person having that *status* at the hotel, he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel.

The questions which have frequently come before the courts for consideration were whether a person, upon the facts of the case, was a traveller or a temporary sojourner so as to be deemed a guest, or whether he was to be regarded as a boarder or one at the hotel as a special customer. These questions are elaborately examined in some of the cases above cited; also in *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. D. 574; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 547, 91 Am. D. 657; *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112; *Smith v. Keyes*, 2 T. & C. 650; *Fitch v. Casler*, 17 Hun, 126; *McDonald v. Edgerton*, 5 Barb. 560; *Shoecraft v. Bailey*, 25 Iowa, 554; *Manning v. Wells*, 9 Humph. 746, 51 Am. Dec. 688.

It seems to have been taken for granted in the court below that the plaintiff was a guest at the hotel. But the learned County Court held that § 1725, R. S., requires the guest to deliver his money to the innkeeper himself, or to a clerk having authority from the innkeeper to receive it. As it did not appear that the clerk in this case had such authority, the defendant was relieved from responsibility for the money lost by the clerk. We should hesitate to affirm the correctness of this view of the law. On the contrary, we think a traveller when he goes to a hotel at night and finds a clerk in charge of the office, assigning rooms, etc., has the right to assume that such clerk represents the proprietor and has authority to take charge of money which may be handed him by a guest for safe-keeping. But still in the view which we have taken of the character of the plaintiff, and that he was not a guest at the hotel, this error of the court is immaterial. On the whole record the judgment is right and must be affirmed.

Judgment affirmed.

57. BENNET V. MELLOR,

5 Term Reports 273. 1793.

The defendant was an innkeeper, against whom the plaintiff brought his action for the value of goods stolen out of the inn. At the trial before Buller, J., at the last Lancaster assizes, it appeared that the plaintiff's servant had taken the goods in question to market at Manchester, and not being able to dispose of them went with them to the defendant's inn, and asked the de-

fendant's wife if he could leave the goods there till the week following (meaning the next market day) ; she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him. When he got up after sitting there a little while, the goods were missing. A verdict was found for the plaintiff; and in reporting this case upon a motion for a new trial, Buller, J., observed that he was of opinion that if the defendant's wife had accepted the charge of the goods upon the special request made to her, he should have considered her as a special bailee, and not answerable in this case, having been guilty of no actual negligence; but that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence, in which case the innkeeper was liable to make good the loss.

ASHHURST, J. It does not appear to me that there is any ground for granting a new trial. If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the mere negligence of the plaintiff's servants, the case might have deserved greater consideration; but nothing of that kind appears on the judge's report. According to the report, the case was simply this: the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week; that proposal was rejected; then he sat down in the inn as a guest, with the goods behind him, and during that time the goods were taken away. But, although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.

BULLER, J. Although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited, where the innkeeper said his house was full and refused to take in the guest; that, if true, is a good excuse; and if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week; if the defendant had taken the goods upon that request, he could only have been liable as a bailee; but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn, that is sufficient to charge him. In Calye's case it is said "Although the guest doth not deliver his goods to the inn-holder to keep, nor acquaints him with them, yet if they be carried away or stolen,

the innkeeper shall be charged; and therewith agrees 42 Ed. 3. 11 a." There it is said that on the words of the writ the innkeeper is answerable for everything in his inn, but not for a horse, which the owner orders to be put out to pasture. One of the passages cited from Com. Dig. cannot be supported, if taken in a general sense; for all the authorities agree that it is not necessary to prove negligence in the innkeeper.

GROSE, J. Calye's case, which is a good comment on the writ which gives this action, decides this present case. According to that, if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest; and so says the case in Dyer. If indeed the innkeeper had refused to take in the plaintiff's servant, as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods; in such a case the innkeeper refuses at his peril, and if it be without reason, an action lies for the refusal; but in this case there was no refusal of the person; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper (for the latter did not object to receive him), he was in the same situation as any other guest, and entitled to the same protection for his goods.

Rule discharged.

58. BOWELL V. DE WALD ET AL.,

2 Ind. App. 303, 28 N. E. R. 430. 1891.

Action for money stolen from a satchel at an inn. One Caswell, a travelling salesman of De Wald & Co., had been collecting for them, and became a guest of Bowell at the Ross House, giving the satchel containing \$252 to a servant of the inn. He put it in the coat room adjoining the office. When Caswell called for the satchel, he found it had been opened and the money abstracted.

ROBINSON, J. (After stating the facts and disposing of matters of pleading and practice). There is some conflict in the cases as to the extent of liabilities of innkeepers. In some it is held that they are responsible to the same extent as common carriers.

In note 5 to section 472, Story Bail. (8th ed.), it is said that some American cases seem to hold that the innkeeper may exonerate himself by positive proof that he was not in any way negligent, citing a number of cases, among which is that of *Laird v.*

Eichold, 10 Ind. 212, 71 Am. D. 323. That case decides that although an innkeeper is *prima facie* liable for the loss of the goods of his guest, yet that he may exonerate himself by showing that the loss happened without any fault on his part, and that he exercised the strictest care and diligence. Baker v. Dessauer, 49 Ind. 28.

It is said in 11 Am. and Eng. Encyc. of Law, p. 77, par. 51, "According to one line of cases, perhaps constituting a majority of the decisions, it is, as before explained, not necessary for the guest to prove negligence to support his action for the loss of his goods against the innkeeper; nor will proof by the innkeeper that he was guilty of no negligence be an excuse for him, unless he brings himself within those cases excepted. But, according to a different line of cases, the *prima facie* liability of the innkeeper is based on the presumption of his fault or negligence, and that he may exonerate himself by positive proof that he was not in any way negligent.

"The general rule of diligence, on the part of innkeepers, is that of 'uncommon care,' as Lord Holt has it, or 'the extremest care,' as some of the books have it. But it has been laid down that public utility 'requires that innkeepers be held liable for all losses which might have been prevented by ordinary care.' "

The following cases, decided by the Supreme Court, have a direct bearing upon this question: Hill v. Owen, 5 Blackf. 323, 35 Am. D. 124; Thickstun v. Howard, 8 Blackf. 535; Laird v. Eichold, *supra*; Baker v. Dessauer, *supra*.

It seems clear that these cases, without conflict, declare the rule of law to be that an innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, not occasioned by the act of Providence, the public enemies or the fault of the guest, and the *prima facie* liability is based upon the presumption that the loss or injury arose from the negligence or fault of the innkeeper, but that an innkeeper being thus *prima facie* liable may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible. In Laird v. Eichold, *supra*, after stating the authorities, the court says: "This, we think, is the correct doctrine, founded on principle, as well as authority. Innkeepers, on grounds of public policy, are held to a strict accountability for the goods of their guests. The interests of the public, we think, are sufficiently subserved, by holding the innkeeper *prima facie* liable for the loss or injury of the goods of his guest; thus throwing the burthen of proof upon him, to show that the injury or loss happened without any default on his part, and that he ex-

exercised the strictest care and diligence. And it is more in accordance with the principles of natural justice, to permit him to exonerate himself by making such proof, than to shut the door against him and hold him responsible for an accident happening entirely without his fault, and against which strict care and prudence would not guard."

In *Johnson v. Richardson*, 17 Ill. 302, 63 Am. D. 369, the court says: "The general doctrine deducible from the authorities, ancient and modern, is, that keepers of public inns are bound well and safely to keep the property of the guests accompanying them at the inn; and in case such property is lost or injured, the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part; or, by the fault of the guest, his companions, or servants; or, by superior force; and the burden of proof to exonerate the innkeeper is upon him, for in the first instance the law will attribute the loss or injury to his default."

There are many other authorities in harmony with this doctrine, but it is unnecessary to cite them.

It was not, therefore, necessary to allege in the complaint carelessness and negligence on the part of the appellant.

* * * * *

The sixth finding of the court reads as follows: "That on said day said baggage-room was not secured by lock or otherwise, and it was open, and that said baggage-room had two exterior windows facing the rear yard. There was a rear door to the office of the hotel which was about six feet from the door of said baggage-room; that, on the afternoon of the day said money was taken, said clerk, who was a boy sixteen years of age, was for a period of several hours the only person in charge of said office and baggage-room, and he was absent from said office and baggage-room several times during the course of the afternoon in question on the front porch of the hotel, at one time for at least twenty minutes, when he was the only person in charge of said office and baggage-room, and the said baggage-room could have been entered from the door of the rear of said office, when said clerk was on the front porch, without his being able to see the person so entering said baggage-room. Said defendant did not issue any check to said Caswell for his valise. The guests of said hotel were permitted at all times to enter said baggage-room, and on said day there were twenty guests at said hotel, and the traveling bags or valises of those who had such baggage were kept in said baggage-room. Defendant had no safe in his hotel office for keeping money or valuables of his guests, and the said Cas-

well did not inform said defendant of the contents of his valise.”

Under the case of Johnson v. Richardson, *supra*, and Coskery v. Nagle, 30 Cent. Law. Jour. 158, the failure of the guest to inform the innkeeper or his servant that his valise contained valuables does not constitute negligence.

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The judgment is affirmed, with costs.

59. SIBLEY V. ALDRICH,

33 N. H. 553; 66 Am. D. 745. 1856.

Case, for injury to a horse left by plaintiff's servant in the stable of defendant's inn. It appeared that the horse was kicked by the horse of another traveler, and his leg broken, but defendant offered evidence, which was excluded, that there was no negligence on the part of himself or his servants. Verdict for plaintiff, by consent, judgment to be rendered thereon or verdict set aside as court should see fit.

By Court, PERLEY, C. J. The defendant offered to prove that the damage to the plaintiff's horse was not caused by any actual negligence of himself or his servants. He did not offer to prove that it happened through the negligence or default of the plaintiff, direct or implied; nor by irresistible force, inevitable accident, or by the act of God or the public enemy. The question would seem to be whether, as a general rule, and in all cases, an innkeeper can discharge himself from liability for the loss of his guest's goods by showing that it did not happen by the actual neglect or default of himself or his servants.

On this point the authorities are not unanimous. Story, in his work on bailments, sec. 482, says: “By the common law, as laid down in Calye's Case [8 Co. 32], an innkeeper is not chargeable unless there is some default in him or in his servants, in the well and safe-keeping and custody of his guest's goods and chattels within his common inn, but he is bound to keep them safe, without any stealing or purloining”—quoting thus far the language of the report in Calye's Case, *supra*, and then he adds: “This doctrine is, however, to be taken with the qualification that the loss will be deemed *prima facie* evidence of negligence.” And in section 472, he says that this doctrine should be received with some hesitation, in view of the case of Richmond v. Smith, 3 Barn. & Cress. 9, where a different view of the law seems to have been entertained. Story's authority on a question of this

nature is undoubtedly of great weight; but it is to be observed that he states his opinion with some hesitation, and he does not appear to have reached a conclusion in this instance, after his usual extensive and careful examination of the authorities.

In *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, it was held that when goods have been deposited in a public inn, and there lost or injured, the presumption is that the loss or damage was caused by the negligence of the innkeeper or his servants; but that this presumption may be rebutted, and if the jury find in favor of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty. Lord Denman cited *Story* as authority for this rule. The circumstances of *Dawson v. Chamney*, *supra*, were much like those of the present case. The plaintiff gave his horse in charge to the defendant's hostler, who placed him in a stable with another horse, that kicked him and caused the injury complained of. *Metcalf v. Hess*, 14 Ill. 129, is to the same point, that an innkeeper may discharge himself by showing that the loss happened without any default on his part. The foregoing authorities go to sustain the position of the defendant.

In *Merritt v. Claghorn*, 23 Vt. 177, the court held that an action can not be maintained against an innkeeper to recover for property lost by fire, which was occasioned by inevitable casualty, or superior force, and without any negligence on the part of the innkeeper or his servants. This last case is put on peculiar grounds, and can not be regarded as an authority for the general position that an innkeeper may discharge himself by showing that the loss did not happen by his default. The fire took in another building and spread to the inn.

So in *Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. D. 416, it was held that an innkeeper is *prima facie* liable, but not for a loss by external force or robbery, or if the loss occur by the neglect of the guest or his servants, or his companions: *Forward v. Pittard*, 1 T. R. 27, 31.

On the other hand, there are numerous authorities, direct and strong, to the point that the innkeeper can not discharge himself by showing that loss did not happen by his default, but that he must go further, and show that it was caused by the default, direct or implied, of the owner.

Thus Chancellor Kent, 2 Com. 574, says: "An innkeeper, like a common carrier, is an insurer of the goods of his guest, and can only limit his liability by express agreement or notice. Rigorous as this law may seem, and hard as it may actually be in some instances, it is, as Sir William Jones observes, founded on the principles of public utility to which all private considerations ought to yield." *Metcalf*, in his note to *Bedle v. Morris*,

Yelv. 162, places the liability of an innkeeper and common carrier on the same footing, and so does the civil law: Domat, B. 1, T. U., sec. 2, a, 1. Burgess v. Clements, 4 Mau. & Sel. 306, was much considered. The point there decided was, that an innkeeper is not answerable for the goods of his guest which are lost through the negligence of the guest out of a private room in the inn, chosen by the guest for the purpose of exhibiting the goods for sale, the use of which room was granted by the innkeeper, who, at the same time, told the guest that there was a key, and that he might lock the door, which he neglected to do. In commenting on Calye's Case, 8 Co. 32, and the language of the old writ, Lord Ellenborough is reported to have said: "There can be no doubt, also, that there may be circumstances, as if the guest by his own neglect induces the loss, or himself introduces the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall not complain of the loss." And Le Blanc, J., in the same case, says: "We must take the facts from the report, and also that the judge stated to the jury that the innkeeper was responsible to his guest for the safe custody of his goods, but that the guest might by his own misconduct discharge the innkeeper from that responsibility." Here the general responsibility of the innkeeper for the safety of his guest's goods is clearly conceded. The decision is put on the ground of misconduct in the guest, which caused the loss, without any intimation that mere want of negligence in the innkeeper would discharge him. Farnworth v. Packwood, 1 Stark. 249, is to the same point with Burgess v. Kent, 4 Mau. & Sel. 306.

In Richmond v. Smith, 8 Barn. & Cress. 9, Lord Tenterden says: "It is clear that at common law, when a traveler brings goods to an inn, the landlord is responsible for them. In this respect I think the situation of the landlord was precisely analogous to that of the common carrier;" and Bailey, J., in the same case, says: "It appears to me that an innkeeper's liability very closely resembles that of a common carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated when the guest chooses to have the goods under his own care."

In Kent v. Shuckard, 2 Barn. & Ad. 803, Lord Tenterden is reported to have used the following language: "Innkeepers, like common carriers, are liable by the custom of the realm. The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded is, both by the civil and common law, to compel the innkeeper to take care that no improper per-

son be admitted into his house, and to prevent collusion between him and other persons. In the Digest, L. 4, T. 9, sec. 1, after stating the law that an innkeeper is liable for the goods of his guest, it is said, *Nisi hoc esset statutum materia daretur cum furibus adversus eos, quos recipiunt, coeundi.*''

Armistead v. White, 6 Eng. L. & Eq. 349, was an action against an innkeeper, and the judge charged the jury that if the owner of the goods was guilty of gross negligence, the innkeeper was discharged. The court held the instructions were sufficiently favorable to the plaintiff, and queried whether it was necessary that the negligence of the plaintiff should be gross, to discharge the defendant. It is not easy to understand why the cause should have been left to the jury in this way, if the doctrine of the prior case of *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, had been recognized for law, and it is worthy of remark that no allusion is made to *Dawson v. Chamney*, *supra*, in the report of *Armistead v. White*, *supra*.

In *Mason v. Thompson*, 9 Pick. 280, 20 Am. D. 471, it was decided that an innkeeper is liable for the loss of his guest's goods committed to his care, unless the loss is caused by the act of God or the common enemy, or by the fault of the guest. And Wilde, J., in delivering the opinion of the court, says that this rule may undoubtedly in some cases subject the innkeeper to loss without any negligence or default on his part; that innkeepers as well as common carriers are regarded as insurers of property committed to their care, and are bound to make restitution for any loss or injury not caused by the act of God or the common enemy, or the neglect or fault of the owner. And it was decided in *Washburn v. Jones*, 14 Barb. 193, that an innkeeper is liable for all losses and damages happening, even without his default, excepting such as are caused by inevitable accident or the public enemy.

The question was very fully and ably discussed in the recent case of *Shaw v. Berry*, 31 Me. 478 [52 Am. Dec. 628], and the court there came to the conclusion that to discharge an innkeeper from liability for the loss of goods in his charge it is not sufficient for him to show that the loss did not happen by his neglect or default, but that he must go further and show that it happened by the fault, direct or indirect, of the owner.

The leading case on this subject is *Calye's Case*, 8 Co. 32, a, in which the point resolved was, that if a horse is put out to pasture at the request of the owner by an innkeeper, and is stolen, the innkeeper is not liable, because the horse, not being *infra hospitium*, is not in the charge and custody of the innkeeper as such, and his liability as an innkeeper does not attach. The re-

port cites the words of the old writ, and states that by it all the cases concerning hostlers may be decided. The part of the writ which bore on the point resolved was that which limits the liability of the innkeeper, by the custom of the realm, to goods of the guest *infra hospitium*; and in commenting on the language of the writ, the reporter says that "the innkeeper shall not be charged unless there be a default in him or his servants in the well and safe-keeping and custody of the guest's goods within his common inn; for the innkeeper is bound in law to keep them safe there, without any stealing or purloining, but he ought to keep his goods and chattels there in safety." Considering the connection of these remarks with the point resolved in the case, we think they could not have been intended to lay down any rule defining the extent of the innkeeper's liability for goods in his custody as such, but merely to state that his liability was confined to goods deposited in the inn.

The case then proceeds to state an exception to the rule that the goods within the common inn the innkeeper ought to keep in safety, to wit, that if the goods are stolen by one whom the guest brings with him, the innkeeper is not liable, for then the fault is the guest's. There is no statement in the report that actual negligence is necessary to charge the innkeeper, or that he can discharge himself by showing that the goods were not lost by his actual negligence.

The language of the old writ has sometimes been made the ground of an inference that there must be actual negligence to charge an innkeeper. The writ recites, "that by the custom of the realm, innkeepers are bound to keep the goods of their guests within their common inn, without subtraction or loss, night and day, *ita quod pro defectu hujus modi hospitatorum sed servientium suorum*"—no damage shall in any manner befall such guest. The innkeeper is bound to keep the goods of his guest so that no damage happen by his default or that of his servants. The argument is, that the term *pro defectu* implies actual fault and negligence. But the innkeeper is sued for neglecting to perform his legal duty; and the question occurs, What is the duty which the law and the custom of the realm imposes on him? If the law holds him to keep the goods of his guest at all events, except in case where the loss happens by the act of God or the public enemy, or by the fault of the guest, then if the goods are lost by mere accident, or by robbery, without any want of actual care on his part, the innkeeper has still failed to perform his legal obligation, and the goods are lost by his neglect and failure to perform the duty which the law imposes. The law, in such

case, charges the innkeeper with the duty of keeping the goods safely, and imputes to him the fault, if they are lost or damaged.

In this view of their meaning these words of the writ are by no means idle and unmeaning, because the innkeeper is not in all cases liable for the loss of goods intrusted to his care. The loss may happen by the act of God, by the public enemy, or by the fault of the owner, and in that case the damage does not happen by the default of the innkeeper. If the declaration should merely allege that the goods were lost or damaged, without averring that the loss or damage happened by default of the innkeeper or his servants, it is apprehended that it would be substantially defective, and bad on demurrer, on the strictest rule which has been applied to the innkeeper's liability.

This argument, from the form of pleading, might be urged with equal force to show that a common carrier is only liable for loss that happens by his actual negligence. In the settled form of declaring in a case against a carrier, it is alleged that the defendant, "neglecting his duty in that behalf, did not safely and securely carry," etc., "but so negligently and improperly conducted himself that by and through the negligence, carelessness, and default of the defendant," the goods were lost or damaged: Angell on Carriers, 429, note; *Raphael v. Pickford*, 5 Man. & G. 551; 2 Ch. Pl. 271, 272.

And in the ancient form of declaring against a common carrier, the custom of the realm is alleged to be that *absque subtractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium postatorum, seu servientium suorum hujus modi bona et catalla, eis sic ut prefertur deliberata, non sunt perdita, amissa, seu spoliata;*" and in assigning the breach it was alleged that "*pro defectu bonae custodiae ipsius defendantis et servientium suorum perdita et amissa fuerunt.*"

Three different rules appear to be laid down on this subject in different authorities.

1. That the innkeeper is *prima facie* liable for the loss of goods in his charge; but may discharge himself by showing that the goods were not lost by his negligence or default, and this is the ground taken by the defendant in the present case. This view of the law is sustained by *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, and by *Metcalf v. Hess*, 14 Ill. 129.

2. That the innkeeper is discharged by showing how the accident happened and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominates the act of God, and the force might not be the power of a public enemy. This rule is countenanced by

Merritt v. Claghorn, 23 Vt. 177, and Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am. D. 416.

3. That the innkeeper is liable, unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest. This rule is maintained in Burgess v. Clements, 4 Mau. & Sel. 306; Richmond v. Smith, 8 Barn. & Cress. 9; Farnworth v. Packwood, 1 Stark. 249; Kent v. Shuckard 2 Barn. & Ad. 803; Armistead v. White, 6 Eng. L. & Eq. 349; Mason v. Thompson, 9 Pick. 280, 20 Am. D. 471; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628.

Of text-writers, Story, though with hesitation, goes for the first rule. Kent states the third rule strongly, and Metcalf adopts the same, and the civil law places the liability of the innkeeper and the common carrier on the same footing.

It is somewhat singular that on a practical question, which must be as old as the rudiments of the law, there should be found at this day such diversity of opinion and decision. It is probably owing to the obscure way in which the subject is treated in the report of Calye's Case, 8 Co. 32, and the different interpretations which have been put on that case. On the whole, we think that the better rule is the strict one as laid down in the elaborate and very satisfactory case of Shaw v. Berry, *supra*. The weight of authority is heavily that way, and the policy and analogies of the law lead to the same conclusion.

Judgment on the verdict.

60. CUTLER V. BONNEY,

30 Mich. 259; 18 Am. R. 127. 1874.

Action against an innkeeper for loss due to fire. Judgment for defendants.

CAMPBELL, J. Plaintiffs brought suit to recover the value of certain horses, a wagon, and some goods destroyed by fire in the barn of defendants, who were innkeepers. It is found by the court that there was no fault or negligence in defendants or their servants, the fire which destroyed the barn and its contents having been either accidental or incidental, and taking from an alley or public way outside. No question arises upon anything except the obligation of innkeepers to respond to their guests for property thus destroyed without negligence. It is admitted that the property was in the custody of defendants in that capacity.

It is unfortunate that upon this subject there is some confu-

sion, arising from the loose *dicta* in which many courts have indulged, when dealing with cases involving the liability of innkeepers. It is unsafe to give any force to such remarks beyond the analogies of the cases in which they are found. Upon all questions not decided by recognized and accepted precedents, we can only rest upon the ancient maxims of the common law.

In order to hold a bailee liable for that which is in no respect to be imputed either to his own negligence, or to that of persons for whom he is responsible, there should be found clear authority. The common law has declared this liability against one class of bailees, and has made common carriers responsible for all losses not caused by public enemies, or some casualty in no way arising out of human action. It is claimed by plaintiffs that in this respect common carriers and innkeepers stand on precisely the same footing; and it is not claimed that defendants can be made liable in the present case on any narrower ground.

There are many cases in which it has been said by judges that the liability is not distinguishable. Most of these have been collected in the notes of Mr. Holmes to the last edition of Kent's Commentaries.—2 Kent, 596. But, except in the decisions to be especially referred to hereafter, there is nothing in the facts of any authority which we have discovered, which called for any such remark, or which would justify the enforcement of a liability for such a loss as the present.

With one or two exceptions the cases referred to have arisen from thefts or unexplained losses of property, while it was within the legal custody or protection of the innkeeper. The rule actually applied in all of these cases has been that all such losses were presumably due to the neglect of the innkeeper. Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within, or unexplained, whether committed by guests, servants, or strangers. But he has quite as uniformly been discharged, by any negligence of the guest conducing to the injury, and he has not been held for acts done by the servants of guests, or by those whom they have admitted into their rooms. And in many cases he has been held discharged where the guest has exercised any special control over his property. The general principle seems to be that the innkeeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guarantee.

Beyond this, we have found no decided case anywhere. We have found no decision holding innkeepers liable for losses by purely accidental casualties, or from riots, or acts of force from without, such as have been from the beginning excepted by the

text writers. These writers, or at least such of them as are of recognized authority, have drawn a line between carriers and innkeepers, resting on the distinction between absolute and qualified responsibility. And none of the accepted writers have found any authority for disregarding this distinction. The two classes of bailees have been kept carefully separate.

Judge STORY makes this very clear in his Treatise on Bailments, § 472, where he refers to authorities which we think sustain him. Dawson v. Chamney, 5 Q. B. 164, is directly in point, and the language of the older decisions there referred to excludes the extreme measure of liability. Chancellor Kent is equally explicit that the liability does not extend to robbery or inevitable casualty. 2 Kent's Com. 593. The Roman law, to which both of them refer, included fire under this head. The French law excludes liability for wrongs from without. Ferriere Dic., "Aubergistes;" Story on Bailm., § 465.

But all the modern authorities profess to take their departure from Calye's Case, 8 Co. 32. The case declares that the original writ quoted in it, and found in Fitzherbert's N. B. 94 B., contains the whole ground of the common law. Analyzing the writ, the fourth heading is made to refer to the ground of liability as the default of the innkeeper, "by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe-keeping and custody of their guests, goods and chattels within his common inn." The language in Fitzherbert is "so that by the default of them, the innkeepers or their servants, no damage may come in any manner to their guests." Among the defenses given by Saunders is that "defendant may show that his house was broken open, and a forcible robbery of them committed by thieves." 2 Saund. Pl. & E. 217. And the liability of innkeepers for the acts of others is put by Blackstone on the ground that they were bound to prevent misconduct by those under their control. 1 Bl. 430. Accidental fire stands on quite as strong grounds of exemption as other mishaps.

The common law has in some things been modified by decisions, but it is contrary to law to follow *dicta* made in cases calling for no departure from the old law. It would be a manifest innovation to create a liability where no possible default exists, and to sustain such an innovation, there ought to be both reason and authority. We can not object to follow settled law on our own views of what policy ought to make it. But we are not prepared to assume there is any policy which will compel persons who are in no wise in fault to respond in damages, where the law is not clear against them. And the authorities directly in point on

losses by fire are not numerous, and do not, in our judgment, call for any such consequences.

The doctrine imposing such a liability may be said to rest entirely on what was said by Justice PORTER in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. D. 405. In that case the subject is discussed at some length, and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text-books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism; as he himself declares the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge DENIO would detract much from its force, even if it had been pertinent to the facts.

Opposed to this is the case of *Merritt v. Claghorn*, 23 Vt. 177, in which Judge REDFIELD, delivering the opinion of the court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts. *Vance v. Throckmorton*, 5 Bush (Ky.), 42, 96 Am. D. 327, is to the same effect, but there, too, the decision might have rested on other grounds, and its authority is therefore diminished.

We regard the decision in Vermont as reasonable, and as within the fair meaning of the common-law rule. We think the Circuit Court was right in taking the same view.

The judgment must be affirmed, with costs.

The other justices concurred.

Judgment affirmed.

61. MURCHISON V. SERGENT,

69 Ga. 206; 47 Am. R. 754. 1882.

Action for money and valuables lost at an inn.

Judgment for defendant.

JACKSON, C. J. The plaintiff in error sued the defendant to recover some five hundred dollars of money and the value of a gold watch and chain, which sum of money, together with the watch and chain, was stolen from the plaintiff whilst lodging at the hotel of the defendant and asleep at night in the room he occupied as a guest. The jury found for the defendant, and on the

refusal of the city court of Savannah to grant the plaintiff a new trial on the grounds set out in his motion therefor, he brings the case to be reviewed here.

The facts briefly are that the plaintiff and his wife were on their bridal tour, and remained a few days at the Screven House in Savannah. The plaintiff on retiring to bed laid his clothing watch and chain, and pocket book containing the money, with the clothing on a lounge in the room; and in the morning while dressing he discovered his loss. He testified that he locked and bolted, as he thought, the door of his chamber on retiring, but in the morning ascertained that the bolt did not work and could not penetrate more than one-sixteenth of an inch, and was worn so as to be insecure. A guest who had occupied the same room a short time before also testified to the insecurity of the bolt, going into detail in regard to repeated efforts to bolt the door on his part whilst occupying the room, and after many efforts and the exercise of a good degree of strength and skill, his success at last in making the bolt enter an eighth of an inch—positively swearing to its insecurity. A former employee of the house testified also to the insecurity of the bolt on the door of this room.

On the other side, the proprietor of the hotel and the defendant in this suit, with his clerk, and two or three detectives employed by him, swore that the lock and bolt were perfectly good, and that the plaintiff said to them that he was uncertain about having locked the door, but knew he had not bolted it. The proprietor admitted that he had changed the notice in some of the rooms. It was testified by the plaintiff and wife that there was no notice of any sort on their door or in their room when they went to breakfast, but after their loss was known, on their return after breakfast they found one posted on their door.

The motion for a new trial is based on grounds which may be reduced to three: first, that the register of the hotel where the plaintiff entered his name was admitted illegally in evidence; secondly, that the charge of the court on the subject of notice was erroneous; and thirdly, that the verdict is not supported by the evidence and is against the law of the case.

[After holding that notice in the register was “not posted” as required by the statute]

3. This left as the sole questions for trial, was the plaintiff negligent, and was the loss the consequence of that negligence? The presumption of law is that the defendant, the landlord, was negligent, and his negligence caused the loss. Code, § 2120. That section declares that “in case of loss the presump-

tion is want of proper diligence in the landlord." So the case stands precisely as though the plaintiff had proved gross negligence on the defendant. What "negligence or default by the guest himself, of which the loss is a consequence," and which the same section 2120 enacts shall be "a sufficient defense," by the landlord to show, in order to rebut the presumption the law fixes on him, is proved in this record? No regulation of the hotel was made known to him; no express agreement was made with him; the articles stolen were in the room assigned him. Their deposits in that room, by section 2118 of the Code, was a delivery to this innkeeper, and he must make good their loss, unless the negligence of the guest caused it. and that the landlord must prove.

Was the plaintiff negligent in putting his clothes and watch on the lounge? or in leaving his money in the pocketbook with his clothes? or in not bolting the door, if he did not, in the absence of any notice of a regulation that he must? We can not see, that whilst it may have been carelessness to some extent, any thing of this sort, in the absence of notice of some rule or regulation, is such negligence as will relieve the landlord of that gross negligence of which the law presumes him guilty. The entire room is safe for the guest, if he comply with the rules of the inn. The deposit of any thing in it is a deposit with the landlord—a delivery to him; unless therefore notified that he must not leave it in that room, it is not negligence to do so.

Even if notice had been published to him according to law to deposit valuables in another place, it would not apply to traveling money and a watch of reasonable amount and value. *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. D. 212; *Maltby v. Chapman*, 25 id. 310; *Berkshire Co. v. Proctor*, 7 Cush. 417; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. R. 655.

In the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law. *Morgan v. Ravey*, 6 H. & N. 265; *Buddenburg v. Benner*, 1 Hilt. 84; *Classen v. Leopold*, 2 Sweeny, 705; *Gile v. Libby*, 36 Barb. 70-78. Our statutes have not altered this rule. The fact that negligence is a question for the jury under our law and practice hardly can so alter the law as to prevent the courts from supervising their finding and setting the verdict aside where there is no evidence of legal negligence. So that conceding that plaintiff did not lock and bolt his door, and that the lock and bolt were perfect, in the absence of notice of a regulation published to him according to law, he would not be legally negligent in not doing so; and certainly in the absence

of legal notice to deposit valuables in the safe or at the office, **he** was not in the eye of the law negligent in not depositing **there** the money he used on his travels, and the accompaniment **of** his person, his watch.

[Omitting a question of evidence.]

On the conflict of testimony on these points, however, it is **not** our habit to interfere with the finding of the jury; and a reversal of the court below is put on the points that the register **was** improperly admitted in evidence; that the charge on the **subject** of the notice, which the register was illegally admitted **to** give, is therefore erroneous; and that without notice of some **reasonable** rule or regulation of the inn to the guest, there is **no** sufficient proof in law of negligence in the plaintiff, which **caused** his loss, to rebut and overcome that gross negligence **which** the law fixes by its positive presumption upon the landlord.

Judgment reversed.

OF EXTRAORDINARY LOCATIO BAILMENTS.

OF COMMON CARRIERS.

CHAPTER X.

OF COMMON CARRIERS OF GOODS.

62. FISH V. CHAPMAN,

2 Ga. 349; 46 Am. D. 393. 1847.

Action on a special contract of carriage.

By Court, NISBET, J. The plaintiff in error, William Fish, received at the then head of the Central Railroad from the agent of transportation on that road, certain packages of goods belonging to the defendants in error, Chapman & Ross, which by a special contract he promised to deliver in good order and condition at Macon, unavoidable accidents only excepted. In attempting to cross a stream his wagon was upset and the goods damaged. Chapman & Ross brought suit against him to recover the loss sustained by the injury done to the goods. A number of points are made in the assignment, and some of them of great practical importance in this community. They grow out of the construction which the court below put upon the contract for the carrying of these goods above recited. I shall not consider each point separately, believing that all of them will be discussed and decided in those which I shall particularly notice.

The court below decided that the plaintiff in error under his contract with Chapman & Ross was a common carrier, to which opinion he excepts. The evidence upon this point is the contract and nothing more. It does not appear that carrying was his habitual business; all that does appear from the record is, that he undertook upon a special contract, and upon this occasion, to haul on his own wagon for a compensation specified, the goods of the defendants from the then terminus of the Central Railroad to the city of Macon. Does such an undertaking make him a common carrier? That is the question, and we are inclined to answer it in the negative. A common carrier is one who undertakes to transport from place to place for hire, the

goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods. See Mr. Smith's able commentary on the case of *Coggs v. Bernard*, 1 Smith's Lead. Cas. 369, 7th Am. ed.; *Forward v. Pittard*, 1 T. R. 27; *Morse v. Slue*, 2 Lev. 69; S. C., 1 Vent. 190; S. C., Id. 238; *Rich v. Kneeland*, Cro. Jac. 330; *Maving v. Todd*, 1 Stark. 72; *Brooke v. Pickwick*, 4 Bing. 218. Railway companies are common carriers: *Palmer v. Grand Junction Railway Co.*, 4 Mee. & W. 749.

"Common carriers (says Chancellor Kent) undertake generally and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price:" 2 Kent, 598. "It is not (says Mr. Justice Story) every person who undertakes to carry goods for hire, that is deemed a common carrier. A private person may contract with another for the carriage of his goods and incur no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person under the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business and not as a casual occupation *pro hac vice*:" Story on Bail, sec. 495. A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he can not convey or is not in the habit of conveying: *Jackson v. Rogers*, 2 Show. 327; *Riley v. Horne*, 5 Bing. 217; *Lane v. Cotton*, 1 Ld. Raym. 646; *Edwards v. Sherratt*, 1 East, 604; *Batson v. Donovan*, 4 Barn. & Ald. 21; 2 Kent, 598; *Elsee v. Gatward*, 5 T. R. 143; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133; *Jencks v. Coleman*, 2 Sumn. 221; Story on Bail. 322, 323; *Patton v. Magrath*, Dudley's L. and Eq. 159, 31 Am. Dec. 552.

It will be seen hereafter we hold that according to the common law, as of force in this country in 1776, a common carrier can not vary or limit his liability by notice or special acceptance, and shall advert to this subject again. For the present we state the proposition broadly, that he is in the nature of an insurer of the goods intrusted to his care, and is responsible for every injury sustained by them occasioned by any means whatever, except only the act of God and the king's enemies: 1 Inst. 89, *Dale v. Hall*, 1 Wils. 281; *Covington v. Willan*, Gow. 115; *Davis v. Garrett*, 6 Bing. 716; 2 Kent. 597; *Coggs v. Bernard*,

2 *Ld. Raym.* 918; *Forward v. Pittard*, 1 *T. R.* 27; *Trent Nav. Co. v. Wood*, 3 *Esp.* 127; *Riley v. Horne*, 5 *Bing.* 217. It is from these definitions, and from the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer then that the business of carrying must be habitual and not casual. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own state owning a wagon and team, who do not occasionally contract to carry goods. It would be contrary to reason, and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier, who might once a year, or oftener at long intervals, contract to haul goods from one point in the state to another. Such a rule would be exceedingly inconvenient to the whole community, for if established, it might become difficult in certain districts of our state to procure transportation.

The undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public, he must undertake for all people. A special undertaking for one man does not make a wagoner, or anybody else, a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober, and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we can not and wish not to escape from. To guard this point, therefore, we say, that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier and subject to all his liabilities. One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By this test was Mr. Fish a common carrier? There is no evidence to make him one but his contract with Chapman & Ross. Suppose that after executing this contract, another application had been made to him to carry goods, which he refused, could

he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books, but one, to which I shall presently advert, which would make him liable upon proof of a single carrying operation.

The extent of his liability, and his inability to vary that liability by notice or special acceptance, is another test. A common carrier is liable at all events, but for the act of God and the king's enemies; and he can not limit or vary that liability. Whereas a carrier for hire in a particular case, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier; his liability may be regulated by his contract. We do not think this undertaking would give to Mr. Fish that character which would preclude him from defining his liability in any other contract. By this contract he may be liable *pro hac vice* as a common carrier, for that is a different thing. Upon these views we predicate the opinion, that the plaintiff in error was not a common carrier. From the way in which the opinion of the court is expressed in the bill of exceptions, I am left somewhat in doubt whether the able judge presiding in this cause intended to say that the plaintiff in error was a common carrier, or that under his contract he was liable as such. If the former, we think he erred; and if the latter, as we shall more fully show, we think with him. In either event we shall not send the case back; for if he meant to say that the plaintiff upon general principles was a common carrier, thinking, as we do, that he is liable under this contract as such, he will not be benefited by the case's going back.

In conflict with these views, it has been held in Pennsylvania, that "a wagoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment:" Gibson, C. J., in *Gordon v. Hutchinson*, 1 Watts & S. 285, 37 Am. Dec. 464. This decision no doubt contemplates an undertaking to carry generally, without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient: See Story on Bail., secs. 457, 495; Bac. Abr., Carrier, A.; *Robinson v. Dunmore*, 2 Bos. & Pul. 416; *Hodgson v. Fullarton*, 4 Taunt. 787; *Jones' Bail.*, 121; *Satterlee v. Groat*, 1 Wend. 272; *Hatchwell v. Cooke*, 6 Taunt. 577; 2 Kent, 597. Assuming, then, that Mr. Fish was not a common carrier, what is he? This is a bailment for hire, "*locatio operis mercium vehendarum*;" the fifth in the learned classification of

bailments, made by Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 918. Mr. Fish is a private person contracting to carry for hire. The next question is, what are his liabilities? And this brings us to the main point of error charged upon the court below, and that is, that it erred in ruling that according to his contract the plaintiff in error was liable as a common carrier. In all cases of carrying for hire by a private person, we state that he is bound to ordinary diligence and a reasonable exercise of skill, and is not responsible for any losses not occasioned by ordinary negligence, unless he has expressly, by the terms of his contract, taken upon himself such risk: *Story on Bail.*, sec. 457; *Coggs v. Bernard*, 2 Ld. Raym. 909, 917, 918; *Hodgson v. Fullarton*, 4 Taunt. 787; *Hatchwell v. Cooke*, 6 Id. 577; 2 Marsh. Ins. 293; *Jones on Bail.* 103, 106, 121; 1 Bell's Com. 461, 463, 467; *Robinson v. Dunmore*, 2 Bos. & Pul. 416; *Brind v. Dale*, 8 Car. & P. 207; 2 Kent, 597.

In this case there is a special contract defining the party's liability, and he does not, therefore, come under the rule last stated; he is liable according to his contract. There are two things to be carefully noted in it, to wit: 1. The undertaking of the bailee (having, as the receipt expresses it, received the goods in "good order and condition"), to deliver them "in like good order and condition;" 2. The qualification of the liability of the bailee, which is expressed in these words, to wit, "unavoidable accidents only excepted." As we understand it, the contract means that the plaintiff in error will deliver the goods in good order and condition, unless prevented by unavoidable accident. If the exception were out of the contract, what then would be the liability of Mr. Fish? Upon the authority of the case of *Robinson v. Dunmore*, 2 Bos. & Pul. 416, I should be inclined to hold that the undertaking to deliver the goods in good order and condition, is equivalent to a warranty to carry them safely, or to deliver them safely. If it is, Mr. Fish, according to that case, would be liable as a common carrier: See *Story on Bail.*, sec. 457; *Robinson v. Dunmore*, 2 Bos. & Pul. 416, *supra*.

But we do not rest our decision upon this view of the contract; we look at that with the exception in it. What, then, is the effect of the exception? We think it is to make him liable at all events, and for everything except for unavoidable accidents. It remains, then, to inquire into and determine what is the legal meaning and effect of these words. And, first, it may be material to say, that the word unavoidable is not the word usually used in the books in this connection, but inevitable. And, further, to say, that these words are in legal as well as

common parlance, synonymous. Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing: See Story on Bail., secs. 25, 511; 2 Kent. 597.

What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant, any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness: Story on Bail., sec. 25; 2 Kent, 597. The act of God excludes all idea of human agency: McArthur and Hurlbut v. Sears, 21 Wend. 190. In this case it is said, "no matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled, or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible:" See also Backhouse v. Sneed, 1 Murphy, 173; 2 Bailey, 157; Id. 421. As the exception in this contract extends only to unavoidable accident, or acts of God, and does not embrace the king's enemies, the bailee could not be protected from liability of losses occasioned by them. Even if the goods had been destroyed by the public enemy, he would have, in that event, been liable. The liability of common carriers goes even yet further; for if goods committed to them are lost by their neglect, through the agency of natural causes which are in themselves irresistible, they are liable; so rigid and severe are the obligations and duties of this common but not very well understood calling. Our opinion is, then, that the exception of unavoidable accidents excludes all other exceptions in this case, "*expressio unius est exclusio alterius.*"

And that Mr. Fish was liable at all events and on every account, but for losses occasioned by unavoidable accidents; that unavoidable or inevitable accidents are the same with the acts of God; and as common carriers are liable for losses on every account but for the acts of God and the king's enemies, so, therefore, is his liability the same as that of a common carrier, except in so far as it is greater in this, that he is not, by his contract, protected as the common carrier is at common law, against losses caused by the public enemy. The upsetting of the wagon on a decayed bridge across a stream, which was the accident which occasioned the loss in this case, is not, in our judgment, an unavoidable accident. We therefore find no error in the court, in holding that Mr. Fish was on his contract liable as a common carrier. With these views of this contract, we do not conceive that it is at all important to say a word upon the question of negligence.

I have said that a common carrier can not vary his liability, as it existed at common law in 1776, by notice or special acceptance. On account of the importance of this subject, I propose to give it a more minute exposition. This is an age of railroads, steamboat companies, stage companies, locomotion, and transportation. It is an era of stir—men and goods run to and fro—and common carriers are multiplied. The convenience of the people and safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers, than at any other period of the world's history. Steam, as a transporting power, has supplanted almost all other agencies, and it is used for the most part by public companies or associations. It is very important that their liability should not only be accurately defined, but publicly declared. Anterior to 1776, the common carrier was an insurer for the delivery of goods intrusted to him, and liable for losses occasioned by all causes except the act of God and the king's enemies, and without the power to limit his responsibility. That this was the law, is proven by the numerous authorities which I have before referred to. No adjudication before that time had relaxed its stringent but salutary severity. It is of consequence to establish this fact, because the common law, as it was usually of force before the revolution, is made obligatory upon this court by our adapting statute. It is said by Mr. Story, that Lord Coke recognized the right of modification, in a note to *Southcote's Case*; and also, that this right was admitted in *Morse v. Slue*, 1 Vent. 238. These are *dicta* which recognized the right before the era of 1776. And these are not adjudications—mere *dicta*, unsupported by authoritative decisions—they reverse nothing, establish nothing. Mr. Story does not himself claim that there was any modification of the rule before that era. He does say, that the right to modify their common law liability “is now (1832) fully recognized:” Story on Bail., sec. 549. All the cases (and they are numerous) in support of his statement, are since our revolution. We do not, however, question that statement. Chancellor Kent says: “The doctrine of the carrier's exemption by means of notice, from his extraordinary responsibility, is said not to have been known until the case of *Forward v. Pittard*, 1 T. R. 27, in 1785, and it was finally recognized and settled by judicial decision, in *Nicholson v. Willan*, 5 East, 507, in 1804:” 2 Kent, 606.

The saying to which the chancellor has reference was made in 1818 by Burrough, J., in *Smith v. Horne*, 8 Taunt. 144, and in this: “The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years

ago." "I lament that the doctrine of notice was ever introduced into Westminster Hall." The case then of *Forward v. Pittard* is the first in which the doctrine of notice is recognized according to Mr. Justice Burrough, and that was in 1785. It was not until 1804, that it was finally settled by judicial decision in *Nicholson v. Willan*, 5 East, 507. Twenty-eight years after the declaration of independence, the question of notice in all its bearings was reviewed with great learning and ability in *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455. I refer to that case now simply for the purpose of saying that the learned judge in that opinion declared "that the doctrine that a carrier may limit his responsibility by notice, was wholly unknown to the common law at the time of our revolution. Thus we think it is made manifest, that in 1776, by the common law, a carrier could not limit or modify his extraordinary responsibility by notice. That it has been allowed since that time we admit, and to this point see *Nicholson v. Willan*, 5 East, 507; *Clay v. Willan*, 1 H. Bl. 298; *Harris v. Packwood*, 3 Taunt. 264; *Evans v. Soule*, 2 Mau. & Sel. 1; *Smith v. Horne*, 8 Taunt. 146; *Batson v. Donovan*, 4 Barn. & Ald. 39; *Riley v. Horne*, 5 Bing. 217; *Bodenham v. Bennett*, 4 Price, 34; *Down v. Fromont*, 4 Camp. 41. Still, however, in England, by common law, since the revolution, a carrier can not by special agreement exempt himself from all responsibility, so as to evade altogether the policy of the law; he can not exempt himself from liability in case of gross negligence and fraud: *Story on Bail*, sec. 549; *Riley v. Horne*, 5 Bing. 218; S. C., 2 Moo. & P. 331, 341; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Wright v. Snell*, Id. 350; *Birkett v. Willan*, 2 Id. 356; *Beck v. Evans*, 3 Camp. 267; S. C., 16 East, 244; *Smith v. Horne*, 4 Price, 31; S. C., 2 Moore, 18; *Newborn v. Just*, 2 Car. & P. 76. "It is perfectly well settled (we quote from Kent) that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants:" 2 Kent, 607. The notices which are allowed in England since the revolution, go only the length of protecting the carrier from that responsibility which belongs to him as an insurer. A distinction is sought to be drawn in some of the books between a notice carried home to the knowledge of the bailor and a special acceptance or contract. I can not see that there is any difference. A notice contains the terms and conditions upon which the carrier will serve the public, or some limitation of his extraordinary responsibility, which when known and acted upon by his customer, is a contract, as much so as if the same stipulations were made by a separate contract with each individual

customer. The only difference is in the mode of proof; the rule of evidence is different, and that is all. It has been so decided, particularly in New York: *Gould v. Hill*, 2 Hill (N. Y.), 624; *Cole v. Goodwin*, 19 Wend. 281, 32 Am. Dec. 470.

It may be safely asserted that the American decisions, with scarcely an exception, sustain the old common-law doctrine. Mr. Wallace, in his notes to Smith's Leading Cases, holds the following language: "That it is possible for a common carrier by either a general notice or a special acceptance to limit his extraordinary liability, is a position which it is believed is not supported by the authority of any adjudged case in the United States:" 1 Smith's Lead. Cas. 183. The reverse doctrine is permanently settled in New York. We, then, adhere to the sound principles of the common law, sustained by the courts of our own union, and hold notices, receipts, and contracts, in restriction of the liability of a common carrier, as known and enforced in 1776, void, because they contravene the policy of the law: *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Camden and Amboy Transportation Company v. Belknap*, 21 Id. 355; *Cole v. Goodwin*, 19 Id. 251, 32 Am. Dec. 470; *Gould v. Hill*, 2 Hill (N. Y.) 623; *Alexander v. Greene*, 3 Id. 9, 20; *Story on Bail*, 4th ed., 558, note; *Atwood v. Reliance T. Co.*, 9 Watts, 87; *Barney v. Prentiss*, 4 Harr. & J. 317, 7 Am. Dec. 670; *Jones v. Voorhees*, 10 Ohio, 145; 2 Kent, 608, note. The British parliament, declaring the sense of the British lawyers to a very great extent, has restored the old law as to the responsibility of carriers. See stat. 11, Geo. IV., and stat. 1, Wm. IV., c. 68; for these statutes, consult 1 Harr. Dig. 551, tit. Carriers, 4th ed., 1837; also, *Hollister v. Nowlen*, 19 Wend. 243, 249, 32 Am. Dec. 455; and *Smith's Mercantile Law*, 233, 238, 2d Lond. ed., 1838.

The only modification of the common law rule which we admit, is the right of the carrier, by notice brought home to the passenger, to require the latter to state the nature and value of the property bailed, and to avail himself of any fraudulent acts or sayings of the bailor: *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470; *Camden etc. R. R. Co. v. Belknap*, 21 Id. 354; Id. 153; *Gould v. Hill*, 2 Hill (N. Y.), 623. The reasons given by eminent jurists in support of the law of carriers, as we now hold it, are entirely satisfactory, and apply with far greater force now than when they were announced. Holt, C. J., in his opinion in *Coggs v. Bernard*, an opinion which alone has made him immortal, calls it, "a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of per-

sons, that they may be safe in their ways of dealings, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And that is the reason the law is founded upon in that point."

In *Forward v. Pittard*, 1 T. R. 27, Lord Mansfield says: "The law presumes against the carrier, to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled." It is not the reward which he gets by virtue of his contract which charges him as an insurer; it is true, that he is paid for his risks, but it is because he is in fact a public officer, in whose fidelity the public is compelled to trust, and whose infidelity it is so difficult, if not impossible, to establish by proof. The place of the carrier is a public office. In *Ansell v. Waterhouse*, 2 Chit. 1, Holroyd, J., said: "This action is founded on what is quite collateral to the contract, if any; and the terms of the contract, unless changing the duty of a common carrier, are in this case quite immaterial. The declaration states an obligation imposed upon him by law. This is an action against a person who, by ancient law, held as it were a public office, and was bound to the public. This action is founded on the general obligation of the law." The reasons of the rule may be summed up as follows:

The carrier is recognized as a public agent; for his services he is entitled to ample reward, and is not bound to perform them unless it is paid or tendered; *ex necessitate rei* the most unqualified confidence is reposed in him; this confidence is indispensable to the exercise of his vocation. From the nature of his calling, the utmost facilities are at his control for fraudulent conduct and collusive combinations, and for the same reason his frauds or combinations are difficult of proof. He enters into this line of business voluntarily, and with a knowledge of all its hazards, for he is justly presumed to know the laws of the land. The law, then, looking to the great interests of commerce, and guarding with parental care the rights of the greatest number, makes him an insurer of the property delivered to him. With what resistless force does not this reasoning apply to the ten thousand incorporations of our own country? Strong in associated wealth; strong in the mind which is usually enlisted in their management; and yet stronger, far stronger, in the large immunities and extraordinary privileges with which their charters invest them. If these, as carriers, can vary their liability at all, at what limits does the power stop? Where are its boundaries? Outside of the obligations which their charters

impose, there would be neither bounds not limitations; the citizens would be at their mercy, bound by their power and subject to their caprices. The inconveniences of the modern English rule are well portrayed by Bronson, J., in his opinion in *Hollister v. Nowlen*, *supra*, while exhibiting its effects in England:

“Departing as it did (says Mr. Bronson) from the simplicity and certainty of the common law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment, and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value, unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether notwithstanding the notice he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer; whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business, and then, whether it was painted in large or small letters; and whether the owner went himself or sent his servant with the goods, and whether the servant could read—these and many other questions were debated in the courts whilst the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law.” Well might the judges lament that the doctrine was ever admitted into Westminster hall: See 1 Bell’s Com. 474.

Thus, whether satisfactorily or not, have we disposed of the real questions made in this cause. Let the judgment of the court below be affirmed.

63. ALLEN V. SACKRIDER,

37 N. Y. 341. 1867.

PARKER, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants, to be transported from Trenton, in the province of Canada, to Ogdensburgh, in this state, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The plaintiffs in the fall of 1859 were partners, doing a business at Ogdensburgh. The defendants were the owners of the sloop *Creole*, of which Farnham was master. In the fall of 1859, the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at \$100 for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of \$1,346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident or what in law is termed the act of God. From these facts my conclusions of law are that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and therefore the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not I think make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of the sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined in *Gisbourn v. Hurst*, 1 Salk. 249, to be "any man undertaking for hire, to carry the goods

of all persons indifferently;” and in *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133, to be “one who undertook for hire to transport the goods of *such as choose to employ him* from place to place.” In *Orange Bank v. Brown*, 3 Wend. 161, Chief Justice Savage said: “Every person who undertakes to carry for a compensation, the *goods of all persons indifferently*, is as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is to all persons who choose to employ him, as ready to carry for hire; while the latter agrees in some special case with some private individual to carry for hire.” Story Cont., § 752, a. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. “On the whole,” says Prof. Parsons, “it seems to be clear that no one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier, in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him.” 2 Pars. Cont. (5th ed.) 166, note.

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such in order to invest him with the character and responsibilities of a common carrier; and to meet that necessity says: “The *Creole* was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment.” These facts do not appear in the findings of the referee, and therefore can not, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable unless as common carriers. Very clearly they were not common carriers; and the judgment should therefore be affirmed.

All concurring.

Judgment affirmed.

64. HALE V. NEW JERSEY STEAM NAVIGATION CO.,

15 Conn. 539; 39 Am. D. 398. 1843.

Action on the case for the loss of two carriages by defendants as common carriers.

WILLIAMS, C. J. This suit was brought for two carriages, shipped on board the *Lexington*, against the defendants, as com-

mon carriers, to be transported in said boat for hire, from New York to Boston or Providence. The boat and goods were destroyed by fire in the sound; and a verdict being given for the plaintiff, the defendants excepted to the charge, and claimed:

1. That they were not common carriers, nor subject to the rules that govern common carriers. It was long since settled, that any man, undertaking for hire to carry the goods of all persons indifferently, from place to place, is a common carrier; *Gisbourn v. Hurst*, 1 Salk. 249. Common carriers, says Judge Kent, consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea, and in the aggregate body are included the owners of stage-coaches, who carry goods, as well as passengers, for hire, wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water craft, including steam vessels, and steam tow-boats belonging to internal, as well as coasting and foreign navigation, lightermen, and ferrymen; 2 Kent's Com. 598, 2d ed. And there is no difference between a land and a water carrier: *Proprietors of Trent Navigation v. Wood*, 3 Esp. Cas. 127; *Elliott v. Rossell*, 10 Johns, 7, 6 Am. Dec. 306; *Story on Bail*. 319, 323.

But it is said the rule established is a harsh one, and ought not to be extended. Chancellor Kent takes a very different view of it. He speaks of it as a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation: 2d vol. 602; and with similar views, this court has said, we are not dissatisfied with the reasons which originated the responsibility of common carriers, and believe they apply, with peculiar force, at this day, and in this country, as it respects carriers by water, more especially upon which element a spirit of dangerous adventure has grown up, which disregards the safety, not of property merely, but of human life; *Crosby v. Fitch*, 12 Conn. 419, 31 Am. Dec. 745. And while we are not called upon to extend the principle, we can not yield to the argument that common carriers are not to be responsible when the loss arises from the producing agent of the propelling power.

If the defendants are common carriers, the question must be merely what are the liabilities of common carriers? The answer is, for all losses, even inevitable accidents, except they arise from the act of God, or the public enemy: 2 T. R. 34; 2 Ld. Raym. 918. And by the act of God is meant, something superhuman, or something in opposition to the act of man: *Forward v. Pittard*, 1 T. R. 33. In all cases except of that description, the carriers warrant the safe delivery of the goods; *per* Kent, C. J., *Elliott v. Rossell*, 10 Johns. 7, 6 Am. D. 306; and

masters and owners of vessels are liable as common carriers, as well at sea as in port. And the chief justice says that the argument is not well supported, that this doctrine of the liability of carriers, is, by the common law of England, to be confined to transportations by water, without the jurisdiction of the realm. All the books and all the cases, which touch the subject, lay down the rule generally, and apply it, as well to shipments to and from foreign ports, as to internal commerce. It is true that in *Aymar v. Astor*, 6 Cow. 269, the then chief justice, without citing a single authority, in giving the opinion of the court, says the master of a vessel, I apprehend, is not responsible, as a common carrier, for all losses, except they happen by the act of God or the enemies of the country. That case has, it is believed, never been treated as law in New York, or elsewhere. It is, indeed, repugnant to prior decisions, says Judge Story. It is not to be taken for sound law, says Judge Kent: 12 Conn. 414. And in *McArthur v. Sears*, 21 Wend. 190, this case is treated as a confessed anomaly, and disapproved as contrary to decisions in other states, and even in their own. And in a suit against the owners of a steamboat on lake Erie, as common carriers, it was held, that nothing would excuse them, except inevitable accident, without the intervention of man, and the act of public enemies. Judge Cowen denies that this case tends to repeal the law of liability of common carriers, and treats it as turning on the exception in the bill of lading.

But it is said, there is no case where the liability is extended to fire on the high seas. If the principle covers such cases, then it is to be supposed the reason such cases are not to be found, is that they have not occurred, or were not contested. If the carrier is subjected for the loss of goods burnt on land, where he was in no fault, we see no reason for exempting the carrier at sea, under similiar circumstances. We apprehend a rule of policy, Lord Mansfield says, in the case alluded to, to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carriers. He is in the nature of an insurer. Every reason here given applies as well to the owners of a steamboat as to the wagoner, whose carriage was burnt without his fault, in the barn where he placed it—the same danger of collusion, of litigation, and the same difficulty in unraveling circumstances. If the policy of the law requires that one shall be an insurer, we think the same policy requires that the other should also be so treated. And if it be true that trade will regulate itself when the rule is understood, compensation will be made, not only in proportion to the labor, but to the risk. And in a recent

case in New York, steamboat owners are treated as other common carriers: *Powell et al. v. Myers*, 26 Wend. 591.

It is stated, that by the laws of Louisiana a different rule prevails in regard to steamboats; but as the laws of that state are, in a great measure, founded upon the civil law, they can have but little influence here.

2. The defendants claim, in the next place, that they are not liable because of the public notice which they gave, that they would not be responsible for losses other than what arose from the fault or negligence of their officers or servants; and they claim, that by the common law a common carrier may limit his responsibility, by express contract or by public notice given of such intended limitation; in support of which they cite many cases from the English books, where that doctrine, after some diversity of opinion, has been recognized and settled. On the part of the plaintiff, it is claimed that these decisions are modern—all since we were separated from that country—after a diversity of opinion in the English courts, and now regretted by eminent judges, and not in accordance with the principles of the common law; and that they have been rejected in New York as not sound law; and that, as this contract was made in New York, its construction must be regulated by that law. It becomes necessary, therefore, to determine by what law this construction of the contract is to be governed.

It appears that this boat was in the business of transportation from New York to Providence, that the plaintiff owned carriages, which he wanted to have transported to Boston; that the defendants received them in New York, to convey them to Boston or Providence; and that they were lost in the sound off Long Island, near Huntington; and the question is, by what law is this contract to be governed? The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor, that they were entered into with a view to the laws of some other state: *Bartsch v. Atwater*, 1 Conn. 409, 416; *Smith v. Mead*, 3 Id. 255, 8 Am. Dec. 183; *Brackett v. Norton*, 4 Id. 520, 10 Am. Dec. 179. There is nothing in this case, either from the location of the parties, or the nature of the contract, which shows, that they could have had any other law in view, than that of the place where it was made. Indeed, as the goods were shipped to be transported from Boston to Providence, there would be the most entire uncertainty what was to be the law of the case, if any other rule was to prevail. We have, therefore, no doubt that the law of New York, as to the duties and obligations of com-

mon carriers, is to be the law of the case. And while we agree with the defendants, that the modern English cases are as they claim, and authorized the common carrier to limit his responsibility by notice to that effect; we are equally clear, that the courts in the state of New York have taken a very different view of the subject, and held, that the rule of the common law as to the liability of common carriers, was a rule founded upon sound principles of policy, to protect the citizens from losses, the true cause of which they could seldom detect; and that it ought not, in this way, to be overthrown or evaded. In *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, the supreme court of that state decided, that where a stage proprietor gave notice that all baggage should be at the risk of the owner, no contract could be implied from such notice, although it was brought home to the owner. So, also, in the case of *Cole v. Goodwin et al.*, Id. 251, 32 Am. Dec. 470, a similar decision was made; and no authority or opinion in that state has been adduced to shake or invalidate these decisions. Without, therefore, giving any opinion as to the law of this state, which the case does not require, we can not doubt that such a notice, by the laws of New York, can not, in any manner, affect the liability of these defendants, as common carriers. And these decisions are certainly supported, in a most able manner, by the learned judges who have pronounced them.

3. On the trial below, the defendants also claimed, that a bill of lading was given restricting their liability, and by accepting this, the plaintiffs were precluded from any claim. On this point the judge charged the jury, that by the laws of New York, neither the notice, nor the bill of lading, would change the liability of the defendants. To the last part of the charge, as well as the first, the defendants object. But as the jury have found there was no bill of lading, in this case, we do not see any necessity for discussing that question; but will barely advert to the cases in the state of New York, which show the ground upon which that opinion was based.

In *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, notice was given, that all baggage was at the risk of the owner; of which notice, it was proved, the plaintiff had knowledge. The plaintiff got out of the stage, and left his trunk; and the carriage went on, and the trunk was lost; and Bronson, J., said, that coach proprietors are answerable as common carriers, for the baggage of passengers; and that they can not limit their responsibility, by a general notice, brought home to the employers, are now settled questions, so far as this court is concerned. And the court decided, that upon these facts, the plaintiff could

recover. Judge Cowen, in an elaborate argument, held, that the restrictions imposed upon common carriers for great public objects, can not be removed by any stipulations of the parties. It is said, from what fell from Judge Bronson (who concurred in the result), in the former case, that he did not concur in this opinion. In a subsequent case of *Alexander v. Greene*, 3 Hill, 20, Judge Bronson says, it is very questionable whether innkeepers and common carriers can contract for a limited liability. And in a note, the reporter says, the case of *Gould v. Hill*, 2 Hill, 623, was not then decided. It was therefore thought, by the judge who tried this cause, better that the jury should pass upon the fact, and leave the question to be examined by this court. As it is, we are not called upon to settle the law of New York on the subject; much less would we intimate an opinion, that it can be considered as the law of this state, though it is supported with great learning and ingenuity.

4. The defendants, however, claim, that the court below, aside from any question arising on the bill of lading, gave an opinion to the jury that, notwithstanding any stipulations of the parties restricting the liability of the carriers, they would be liable in this case. The judge who tried the cause below, had no idea of any question of that kind. No claim was made but what arose from the notice or the bill of lading. And we think, there is nothing upon this motion which can be fairly referred to anything else. What are the facts and claims stated in the motion? The defendants claimed, they had given public notice that they would not be liable for losses, except what arose from want of care or negligence on the part of their servants; and that their agents were not authorized to receive goods on board, without delivering a bill of lading, containing such restrictions. They further claimed, that the plaintiff knew of the notice given as above, and that they dealt with him upon that understanding. They then complain, that as to the restrictions claimed by these notices in their bills of lading, they could not, by the laws of New York, limit their liability as common carriers. This charge met all the evidence offered by the defendants; for the claim of the defendants is founded only upon the notice and the bills of lading. They do, indeed, after setting out their notice, claim, that the plaintiff dealt with them upon that understanding. By this nothing can be meant or intended, but the understanding which is implied from the notice alluded to; and any implication against the bailor, arising from such knowledge or understanding, is explicitly repelled, in the cases alluded to in *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455. We think, therefore, that the question was

fully presented to the jury. They have negatived the fact as to the bill of lading; and the effect of the notice has been settled by the supreme court of the state of New York. We do not, therefore, see any ground for a new trial.

In this opinion the other judges concurred.

New trial not to be granted.

65. THOMPSON-HOUSTON ELECTRIC CO. V. SIMON.

20 Ore. 60; 25 Pac. R. 147; 23 Am. St. R. 86. 1890.

LORD, J. This is an action to condemn a right of way for a street and suburban railway operated for the carrying of passengers. A demurrer was filed to the complaint which was sustained by the court below; and the plaintiff refusing to proceed, judgment was rendered therein, from which this appeal is taken. The contention of the plaintiff is, that our statute authorizing the condemnation of land for a right of way contemplates the exercise of such power as much by street and suburban railways propelled by horse-power or electricity as railroads where cars are propelled by steam. The argument is, that section 3239, Hill's Code, which provides that "a corporation organized for the construction of any railway" may appropriate land for a right of way, by the use of the phrase "any railway," *ex vi termini* includes street and suburban railway corporations organized to transport passengers only, and propelled by horse-power or electricity, as well as railroads authorized to transport passengers and freight, and propelled by steam; that the terms of the statute, viewed as a whole, indicate and import that it was intended to authorize railway corporations to condemn lands for the use of their road, whether they were organized to carry passengers or freight, or both, or whether they were propelled by steam or other power. To strengthen the construction, that it is not necessary that the railway corporation, however propelled, should be formed to carry passengers and freight to entitle it to exercise the power of eminent domain, and condemn lands for its use, the language of section 3236 is relied upon as showing that this distinction is not observed with reference to navigation corporations authorized to construct portage railways, wherein it reads, "for the purposes of transporting freight or passengers across any portage on the line of such navigation, . . . in like manner and with like effect as if such corporation had been formed for such purpose." To this it is answered that every railway

corporation for the construction of a railroad under the statute for the condemnation of lands is a common carrier, and that such a statute, being in derogation of common right, is not to be extended by implication. Section 3254 of the statute, authorizing the condemnation of land for a right of way, provides: "Every corporation formed under this chapter for the construction of a railway, as to such road shall be deemed common carriers, and shall be entitled to collect and receive a just compensation for transportation of persons or property over such road." The argument is, that a common carrier is a carrier of goods for hire, and while a common carrier may carry passengers, and combine the two employments of carrying goods and passengers, as is almost universally done by railroads, yet as a corporation for the construction of a railway it can not be deemed a common carrier unless it is formed to carry goods and passengers; that the legislature in delegating the right of eminent domain intended only that such railroads should be entitled to exercise it as were common carriers of freight and passengers; hence a corporation could not exercise the right of eminent domain in the construction of a railway organized to transport passengers only, and not freight. Much of this argument is based on the technical definition of a common carrier, as one who undertakes for hire to transport the goods of such as choose to employ him from place to place; so that before a corporation can be deemed a common carrier, it must of necessity include in its business the transportation of goods or freight from place to place. There is usually in a railway act some sections which have the effect of putting the railway company on the footing of common carriers: 2 Rob. Pr. 534. But whether made so by general statute or by their charters, railroad companies are held to be common carriers: 2 Am. & Eng. Ency. of Law, 781. And it is said when they are made so by the express provision of a statute, such provision will be merely declaratory of the law as it already existed: Hutchinson on Carriers, sec. 67. A common carrier is such, because his duties partake of a public character. "To bring a person," says Judge Story, "within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*": Story on Bailments, sec. 495. To constitute one, then, a common carrier, it is necessary that he should hold himself out as such. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a pub-

lic employment, and is a public or common carrier of passengers.

“A common carrier of passengers,” says Judge Thompson, “is one who undertakes for hire to carry all persons, indifferently, who may apply for passage. Railroad companies, the owners of ships, ferries, omnibuses, street-cars, and stage-coaches are usually common carriers of passengers”: Thompson on Carriers of Passengers, 26, note 1.

It is true that carriers of passengers are not common carriers as to the persons of those whom they carry. But common carriers are classified as carriers of goods and as carriers of passengers. The reason is, their employment is *quasi* public, and the public have an interest in the faithful discharge of their duties. “Every common carrier,” said Mulkey, J., “has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligation to carry passengers, and *vice versa*. So if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will, nevertheless, be a common carrier”: Wiggins Ferry Co. v. East St. Louis U. R’y Co., 107 Ill. 451. A common carrier, then, may be either a carrier of passengers or freight, or both. The argument, then, that the plaintiff is not the kind of a corporation authorized to exercise the power of eminent domain because it is only a carrier of passengers, and not of freight, would not deprive the plaintiff of its character as a common carrier, and as such to be deemed within the statute. This would result in giving to the statute a construction which would include both classes of carriers, but not necessarily that such carriers should combine both employments; it might be engaged in carrying passengers or freight or both, and still be deemed a common carrier.

(The court determined, however, that the statute was not intended to apply to such an electric street railway as that in contemplation.) Judgment affirmed.

66. CHRISTENSON V. AMERICAN EXPRESS CO.

15 Minn. 270; 2 Am. R. 122. 1870.

Action against defendants as common carriers for the loss of two chests of tea. Defendants answered that they were not common carriers, but forwarders, under a bill of lading exempt-

ing them from liability for loss due to perils of navigation or transportation. The tea was lost while in charge of defendants' messenger on a steamboat not owned nor controlled by defendants. Through negligence the steamboat struck a sunken snag, causing the accident. Judgment for plaintiffs.

BERRY, J. The defendants are an express company, engaged generally, and publicly, in the business of transmitting, for hire, goods from place to place, and, among others, from New York to Mankato. At different points to which their business extends they establish local offices, at which an agent is stationed, whose duty it is to receive goods transmitted, and deliver the same to the consignee, as well as to receive goods for transmission. The defendants own no vehicles or other means of transportation, except such as are kept at their local offices, and used solely for the purpose of carrying goods to and from such offices, to and from their customers, at the places where the offices are established. The practice of the company is to transmit goods by steamboats, railroads, coaches, etc., owned and controlled by other parties; and it receives to its own use the entire charges for transportation. A messenger in the company's employ accompanies the goods as they are being transmitted, to take general charge of the same, attend to their transshipment, and to their delivery to the local agent at the point of destination. A common carrier is defined to be "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 53, 11 Am. D. 133; 2 *Parsons on Contracts*, 163; 1 *Smith L. Cases*, 301. In *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. D. 68, it is held, that one whose business is for hire to take goods from the custody of their owner, assume entire possession and control of them, transport them from place to place, and deliver them at a point of destination to consignees or agents, there authorized to receive them, is a common carrier, although he styles himself an express forwarder, and although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control. These definitions are in our opinion correct, and the defendants, falling within them, must be regarded as common carriers. See, also, *Sweet v. Barney*, 23 N. Y. 335; *Russell v. Livingston*, 19 Barb. 346; 2 *Redf. on Railways*, 19, 30.

This action is brought to recover \$150, for two chests of tea belonging to the plaintiffs, the receipt of which by the defendants for transmission from New York to Mankato, and the

total loss of which, by the sinking of a steamboat, not owned or controlled by the defendants, but upon which the same were being transmitted, are admitted. It is also admitted that the boat sank in consequence of running upon a snag in the Minnesota river, but whether this was, or was not, owing to negligence on the part of those managing the boat is a matter of dispute, as to which the testimony is conflicting. Suffice it to say, however, that there is evidence in the case reasonably tending to sustain the finding of the referee, that the persons operating the boat were guilty of negligence in running upon the snag, so that there is no occasion to disturb the finding, on the ground that it is unsupported by the evidence in this respect. It is found by the referee that Bass and Clark, respondents' consignors, delivered the tea to the defendants at New York, consigned to plaintiffs at Mankato, and at the time of such delivery took from defendants the following receipt:

American Express Company, express forwarders and foreign and domestic agents. Principal office Nos. 57, 59 and 61 Hudson street. Branch offices, 124 Broadway and 542 Broadway.
NEW YORK, April 29, 1867.

Bass and Clark delivered to us two chests tea marked Christenson & Bro., Mankato, Minn., which we are to forward to our agency nearest or most convenient to destination, only perils of navigation and transportation excepted, and it is hereby expressly agreed, and is part of the consideration of this contract, that the American Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing, for over \$150, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of the enemies of the government, the restraint of the government, mobs, riots, insurrections, pirates or from any of the dangers incident to a time of war, nor upon any property or thing, unless properly packed and secured for transportation, nor upon any fragile article consisting of or contained in glass.

For the company,

SPENCE.

At common law a common carrier is an insurer of the goods intrusted to him, and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy. Angell on Carriers, §§ 67, 148, 153; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 381.

After much controversy, it may now be taken as settled by the great preponderance of authority, that it is competent for a common carrier to modify or limit his common-law liability by spe-

cial agreement with the owner of the goods. *York Co. v. Central R. R.*, 3 Wall. 112; *Judson v. W. R. R. Co.*, 6 Allen (Mass.) 489, 83 Am. D. 646; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485, 62 Am. D. 125; 2 Redfield on Railways, 93; 2 Parsons on Contracts, 233-237, notes and cases cited.

While there is some conflict of opinion among courts and text writers as to the extent to which the carrier may be permitted to modify or limit his common-law liability as an insurer, we think the better and wiser opinion is, that he shall not be permitted to exonerate himself from liability for his own negligence, or the negligence of the agents whom he employs to perform the transportation. The undertaking is to carry the goods; and to relieve the carrier from liability for loss or damage arising from negligence in performing his contract is to ignore the contract itself. It is to say that he shall not be liable for neglecting to do that which he agreed to do, for which alone the goods were delivered to him, and for which alone he has received, or is to receive, compensation. This construction would not only be repugnant to the contract, but it would be contrary to the whole spirit and policy of our laws, which make a person who undertakes to do a particular thing answerable in damages if, through his own fault or negligence, he fails to do it, or does it improperly. *York Co. v. Central R. R.*, 3 Wall. 112; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. D. 533; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; 2 Redfield on Railways, 98-108; *Wyld v. Pickford*, 8 Mees. & Wels. 443; 2 Parsons on Contracts, 247, note; *Sager v. Portsmouth R. R. Co.*, 31 Me. 228; *Farnham v. R. R. Co.*, 55 Penn. St. 53; Angell on Carriers, §§ 265, 267. And he is responsible, notwithstanding the special agreement, for ordinary neglect; that is to say, for the want of ordinary diligence. *Wyld v. Pickford*, *supra*; Angell on Carriers, §§ 54, 268; 2 Parsons on Contracts (5th ed.), 243, note.

The special agreement may be in the form of a special acceptance of the goods by the carrier, as by a unilateral bill of lading, or receipt. *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485, 62 Am. D. 125; *Boorman v. Am. Express Co.*, 21 Wis. 152; 2 Redfield on Railways, 28; *Prentice v. Decker*, 49 Barb. 30; *Farnham v. R. R. Co.*, 55 Penn. St. 53; Angell on Carriers §§ 54, 220.

But to bind the shipper by the terms of the special acceptance, he must expressly assent to it, or it must be brought home to him under circumstances from which his assent is to be implied. *Judson v. W. R. R. Co.*, 6 Allen (Mass.) 489, 83 Am. D. 646; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., *supra*; 2 Redfield on Railways, 22, 93.

In this case it appears that, simultaneously with the delivery of the goods to the defendants, the receipt above recited was delivered to the plaintiffs' consignors, and it was produced in evidence by the plaintiffs upon the trial. In the absence of evidence to the contrary, it is to be presumed that the consignors were the plaintiffs' agents to contract for the transportation of the goods; and the delivery of the receipt to the consignors must be held to be equivalent to a delivery to the plaintiffs, to whose possession it appears to have come. And as there is nothing tending to show that any objection was made to the terms of the receipt, or that they escaped attention, the assent of the consignors—the plaintiff's agents, and of the plaintiffs through their agents—to such terms is also to be presumed. *Gould v. Hill*, 2 Hill, 623; 2 Parsons on Contracts, 234; 2 Redfield on Railways, 22, 28; *Boorman v. Am. Express Co.*, 21 Wis. 158; *King v. Woodbridge*, 34 Vt. 571; *Shaw v. R. R. Co.*, 13 Ad. & El. (N. S.) 347; *Palmer v. Grand Junction R. W. Co.*, 4 M. & W. 749; *Dorr v. N. J. Steam Nav. Co.*, 1 Kern. 491, 62 Am. D. 125. We are not, however, to be understood as determining that the circumstances under which receipts of this character are delivered may not sometimes be such as to repel any presumption of assent to their terms arising from the simple fact of taking such receipts. And this brings us to the most difficult question in the case, viz.: what is the fair construction of the receipt?

The defendants style themselves "express forwarders," and they agree to "forward" the goods. But this language does not necessarily give them the character of simple forwarders, nor prevent them from being treated as common carriers. *Buckland v. Adams Express Co.*, *supra*; *Read v. Spaulding*, 5 Bosw. 404.

Then they agree to forward "only perils of navigation and transportation excepted"; but while this exception embraces more than the "act of God," it goes no further than to exempt the carrier from liability for such perils as could not be foreseen or avoided in the exercise of care and prudence. The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction is analogous to that which is put upon the words "perils of the sea," or "dangers of the lake," in bills of lading. *Fairchild v. Slocum*, 19 Wend. 332; S. C., 7 Hill 292; *Whitesides v. Thurlkill*, 12 Smedes & Marsh, 599; *Hays v. Kennedy*, 41 Penn. St. 378; *Edwards on Bailments*, 492-496, and cases cited; *Angell on Carriers*, §§ 166-174. While, then, it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation,

as appears to have been done in Tennessee (see cases cited in Edwards on Bailments, 492), if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs, as the referee finds in the case at bar, the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to the peril of navigation. Having undertaken to carry the goods, the carrier shall not be heard to set up his own negligence to excuse him from responsibility.

The receipt goes on to say: "And it is hereby expressly agreed, and is part of the consideration of this contract, that the American Express Company are not to be held liable for any loss or damage, except as forwarders only." By this clause it is contended that the responsibility of the defendants is limited to that of forwarders, pure and simple; that *pro hac vice* they are forwarders to all intents and purposes. Now a mere forwarder is absolved from liability upon showing that he used ordinary diligence in sending on the goods, by careful, suitable and responsible carriers. Edwards on Bailments, 293; Roberts v. Turner, 12 Johns (N. Y.) 233, 7 Am. D. 311; Brown v. Denison, 2 Wend. 594; Johnson v. N. Y. Cent. R. R. Co., 33 N. Y. 610, 88 Am. D. 416. And the defendants insist that the boat, by the sinking of which the loss in this case was occasioned, being staunch and strong, properly manned and equipped, and run by a responsible company, they, the defendants, have done all that was required of them, and are therefore not liable. But looking at the whole scope of the receipt and at the mode in which the defendants transact their business, we think the construction contended for by the defendants cannot be allowed. The defendants do not agree to simply forward the goods as mere forwarders do, by delivering them to a carrier. In such cases, if the forwarder has exercised due diligence in selecting the carrier (when no particular carrier is designated by the owner of the goods), his duty is discharged; his connection with and responsibility for the goods cease; he has no interest in the freight, nor any thing to do with their ultimate delivery to the consignee at the point of destination. But in this case the defendants not only agree to forward the goods, but to forward them to their own agent. As the defendants state in their answer, such agent is, according to their usual course of business, to deliver the goods to the owner personally, and he receives the entire charges.

A messenger in the employ of the defendants accompanies the goods as they are being transported, to take general charge of the same and attend to their transshipment and delivery to the proper local agent. The defendants are not simply agents for

the shipper to contract for the transportation of the goods. There is no contract between the owner of the goods and the owners of the vehicles or vessels which the defendants employ in conducting their business. The goods are delivered in the first instance to the defendants; the defendants, through their messenger, have charge of them during their transmission; the defendants employ the vehicles and vessels used in transportation for themselves, not for the shipper; the goods, when they reach the point of destination, are passed over by the messenger to the defendants' local agent, and by him delivered to the consignee. As remarked in a former part of this opinion, the defendants must, under this state of facts, be regarded as common carriers. Their contract is to *carry* the goods, and having entered into this contract they are not to be permitted to say that they shall not be responsible for the negligence of themselves or of the agencies employed by them in its performance, though they may, by special agreement, modify and limit their common-law liability as insurers of the goods.

From the very nature of their business, and of the service which they undertake to render to the plaintiffs, the defendants are not forwarders, but carriers, and when they assume to restrict their liability to that of forwarders, it is as much as to say that they will not be responsible to the owners of the goods according to their true character and to the actual relation which they sustain to them. In our opinion, then, the effect claimed for this clause of the receipt by the defendants is inconsistent with, and repugnant to, the scope and intent of the receipt, viewed as a whole, and in connection with the facts showing the defendant's real character and mode of doing business. And although the defendants' liability at common law, as common carriers and insurers of the goods, is modified by other provisions of the receipt, as well as possibly in some respects by the clause under consideration, it is not so far modified by either as to exempt the defendants from responsibility for their own negligence, or the negligence of the agents employed by them in the transmission of the goods. In fact, so far as the simple duty of carrying is concerned, this clause would seem to have no bearing or application. In *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 75 Am. D. 211, where an express receipt contained a stipulation that the express company were "not to be responsible except as forwarders," it was held to mean that the "liability" shall be governed by the principles of law applicable to forwarders; that is, that they shall only be liable for losses arising from a want of ordinary care on the part of themselves and in the agencies made use of by them in the exercise of their ordinary

business of carriers. But though the view thus taken by the supreme court of California would, in the case at bar, lead to the same conclusion to which we arrive, the construction strikes us to be somewhat forced. We think the view which we take is the more rational, and it is substantially the same suggested by Mr. Redfield in his note to the case cited. 2 Redfield on Railways (4th ed.), 25.

In the case at bar, then, the receipt, and, for the purposes of this action, the value of the goods, and the loss by the sinking of the boat being undisputed, and the fact being found by the referee that the loss was occasioned by the negligence of those who were running the boat, judgment was properly rendered against the defendants. We have not adverted to the finding that the express messenger was also guilty of negligence, because that finding is not necessary to support the judgment, as well as because we have great doubts whether it is supported by the evidence in the case.

Judgment affirmed.

CHAPTER XI.

OF THE RIGHTS AND DUTIES OF THE COMMON CARRIER.

67. GALENA AND CHICAGO UNION RAILROAD CO. V. RAE.

18 Ill. 488; 68 Am. D. 574. 1857.

ACTION on the case for failure to supply grain cars. Judgment for plaintiff.

By COURT, SKINNER, J. This was an action on the case against the railroad company as common carriers, for refusal to carry, and for delay in carrying, the grain of the plaintiff below from Rockford to Chicago. The cause was tried by jury, who returned a verdict of four thousand nine hundred and fifty dollars against the company, upon which the court rendered judgment, refusing to grant a new trial. The evidence is very voluminous, and in the opinion of the court is insufficient to sustain a verdict for the amount found.

The instructions in the record, and involved in the assignments of error, are seventeen in number, and a critical examination of each, in our opinion, would embrace almost the entire law relating to common carriers. This court is under no obligation to write a treatise upon this branch of the law, nor was the court below bound to act upon instructions not necessary to enlighten the jury of the law arising upon the evidence properly before them. As the cause will be again for trial, we will state those rules of law in controversy which are material to the case made by the record.

The evidence shows that the company had the necessary means and facilities for transporting with dispatch the amount of freight ordinarily for carriage, and that at the period when the wrong is charged to have been committed there was an unusual and extraordinary quantity of grain for shipment, owing to the great harvest of that year and want of facilities for storage in the country. In this respect the company was not in default in regard to that duty it owed the public of affording reasonable facilities for the transportation of freight. Neither the common law nor the statute requires anything more than

that the company shall furnish reasonable and ordinary facilities of transportation—such as are adapted to its mode of conveyance and will meet the ordinary demands of the public. The company was not bound to provide in advance for or anticipate extraordinary occasions, or an unusual influx of freight to the road: *Wibert v. New York etc. R. R. Co.* 19 Barb. 36; Stats. 1856, p. 1070.

Corporations for carrying are created for the public good, and powers and privileges are given them in consideration of the benefits they are expected to confer upon the public. Their obligations to the public require the use of their facilities fairly, and in such manner as is best calculated, in the prosecution of their business, to afford the largest public benefit. An honest and fair endeavor in the course of their legitimate enterprise to accomplish this is all that can be legally required of them.

If by reason of the condition of the country and the peculiar occasion—an unusual quantity of grain on the line for shipment, a want of means in the country for storing it, or other pressing cause—the company took grain from wagons, or from boats from Oregon, while grain remained in private warehouses for shipment, and in so doing acted in good faith, intending to afford the largest public accommodation, and not from motives of partiality or oppression, it has not thereby incurred legal liability. If the plaintiff below has, in consequence of an extraordinary occasion, or of the public necessities, and not from the wrong of the company, sustained a loss, he must be content that his loss is suffered for the public good.

The company is liable for the frauds and negligence of its agents and employees, in the course of their employment; and if those in charge of the company's cars, whose duty it was to assign or give them out to be loaded with grain, through bribery or from motives of partiality or oppression, gave them to persons, by the course and usage of the company, or in fact, not rightfully entitled to them, and thereby deprived the plaintiff below of the facilities of shipping his grain he should have had, he is entitled to such damages as he may have sustained therefrom: *Middleton v. Fowler*, 1 Salk. 282; *Boson v. Sandford*, 2 Id. 440; *Story on Agency*, §§ 139, 453; *Parsons on Cont.*, 62, 63.

The company was bound to use due diligence in carrying the grain taken to the place of destination; and if for want of such diligence the grain taken was not carried and delivered at Chicago, in the usual and reasonable time, the company is liable for the damages thereby sustained; and if unreasonable delay is shown, the company, to discharge itself, must show a reasonable excuse, arising from accident, or other cause, not the conse-

quence of negligence: *Parsons v. Hardy*, 14 Wend. 216, 38 Am. Dec. 521; *Dows v. Cobb*, 12 Barb. 310; *Story on Bailm.*, § 509.

The company was bound to receive the grain of the plaintiff according to its custom and usage; and if that usage was to run their cars upon a side-track to private warehouses, and there receive grain in the cars, a tender accordingly, or notice and readiness so to deliver, would impose obligations on the company to take and carry the grain. Having adopted this mode, the company could not capriciously require that the grain should be delivered in a different manner or at a different place: *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Fulton Ins. Co. v. Milner*, 23 Ala. 420; *Dixon v. Dunham*, 14 Ill. 324. It was incumbent on the plaintiff below to prove a tender of the customary price of carrying the grain offered to be shipped, or a readiness and willingness to pay according to the course and usage of the company in such case. The company should have a lien upon the grain carried for reasonable charges, and could withhold the same from delivery until paid. A readiness and willingness to pay the reasonable charges for carrying, according to the usage of the company, would be sufficient to impose the obligation to carry, unless the company required prepayment, and then the plaintiff would be required to offer and be ready to pay accordingly. Slight evidence, however, of readiness and willingness to pay would be sufficient, and they may be presumed or inferred from surrounding circumstances tending to raise such presumption: *Story on Bailm.*, § 508; *Angell & Ames on Carriers*, § 124; *Parsons on Cont.*, § 548; *Hough v. Rawson*, 17 Ill. 588.

The measure of damages in this case we regard as settled by the case of *Sangamon etc. R. R. Co. v. Henry*, 14 Ill. 156. If the grain shipped was not delivered in Chicago in reasonable time for any fault of the company, the measure of damages is the difference in the value of the grain at Chicago, when it was in fact delivered, and when it should have been, in the usual course of transportation, delivered there. If the company wrongfully refused to carry the grain, the measure of damages is the difference between the value at Chicago when, if carried, it should have reached there, and its value at such time at the place whence it should have been taken, including the necessary expense of storage and deterioration, and the like, accruing by reason of its detention, and deducting the reasonable expense of transportation: *Green v. Mann*, 11 Id. 613.

There is no proof in the case that the grain was lost or damaged by being detained at Rockford, and the jury probably based their verdict upon the hypothesis that the company was bound

to be ready at all events to carry whatever amount of freight was for transportation, and when required.

Judgment reversed and cause remanded.

68. ILLINOIS CENTRAL RAILROAD CO. V. FRANKENBERG.

54 Ill. 88; 5 Am. R. 92. 1870.

ASSUMPSIT against the railroad company for the value of cabbage spoiled through delay by a connecting line. The bill of lading provided that for loss or damage the remedy should be against that carrier in whose custody the packages might be at the time of the injury. Defendant line delivered the cabbage in good condition to the connecting line. Judgment for plaintiff.

BREESE, Ch. J. The question presented by this record is one of great importance to the public, and to the railroad interests of the country, and has received our most careful consideration. It is a question on which the courts of this country are not in harmony with themselves, nor with those of England, to whose decisions we are accustomed to refer as evidence of what the common-law is, on any subject which has engaged their deliberations.

The question is, as to the extent of the liability of a railroad company as common carriers of goods and property.

While there is no difficulty in defining, in general terms, when the liability of a common carrier begins, the courts of this country are not agreed as to the point when it terminates.

A common carrier is defined to be one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place. Railway companies are under obligations to receive and transport all goods which may be offered to them for such purpose, and without delay. They cannot lie by, as the wagoners in early times were accustomed to do, for a rise in the price of freights. They are regarded by all courts as common carriers, resting under a duty to transport such articles as may be delivered to them in the course of their business, and their liability commences when the goods are delivered to their agent authorized to receive them. They may demand the freight money in advance, and if not paid, may refuse to carry the goods, but when they are received they are at the risk of the carrier, and from which time he is regarded as an insurer, and held to the most stringent responsibilities, from which he can only be relieved by the operation of one of two causes, the act

of God or the public enemy. Public policy has always demanded this rule, inasmuch as the goods are entirely in the power of the carrier, and it being so easy for him to conceal his fraud or misconduct, and so difficult for the owner to prove it, that the law does not permit the inquiry, but supplies the want of proof by a conclusive presumption. *Porter v. Chicago and Rock Island R. R. Co.*, 20 Ill. 407, 71 Am. D. 286; *Baldwin v. American Express Co.*, 23 Ill. 197, 74 Am. D. 190.

The liability of the carrier commencing with the receipt of the goods, it necessarily continues until they are delivered by him at their place of destination, where the owner or consignee is bound to be present and receive them and pay the freight for them, if not previously paid. If he be not present to receive the goods, they can be placed in a safe and sufficient warehouse, when the liability of the carrier ceases and that of warehouseman begins.

The important question now arises, is he thus bound to carry and deliver to a point or place not on his route?

This is a question not settled by the courts of this country, though the received doctrine may be said to be, that the carrier is not responsible beyond his own route, except upon his special undertaking so to be liable.

By the law of common carriers, their liability was fixed on the receipt of the goods to be carried. They are insurers of the goods, and if not delivered at their place of destination, they are accountable for them, and when called upon to account for them, the *onus* of proof is upon them and they are chargeable with their value, unless the loss was caused by a force superior to human agency, which no foresight could have guarded against, or by the public enemy.

This is the extent of the liability of common carriers by the common-law. The receipt of goods by them is all that is necessary to fix this liability, so that, if a parcel or package be delivered to a railroad at Chicago, marked for Louisville, Kentucky, or any other place off their route, and they receive it to carry, they are bound, by this rule of the common-law, if the parcel or package be lost, to account to the owner for its value. The contract of the shipper is with the carrier in whose custody he placed the goods.

A responsibility so vast being cast upon carriers by the common-law, it soon became a question how they could remove or lessen it. A resort was had to a general notice, which was held by this court and other courts to be insufficient. *Western Transportation Co. v. Newhall*, 24 Ill. 466, 76 Am. D. 760. But it was held by this court, in the case of the *Illinois Cent. R. R. Co.*

v. Morrison et al, 19 id. 136, that such carriers may relieve themselves from their general liability by special contract. In that case, Morrison, by his writing, under seal, in consideration of a reduction of the freight charges upon a lot of cattle, assumed the risk of transportation, and released the company from all claims which might arise from damage or injury to the stock while in the cars, or for delay in its carriage, or for escape from the cars, and, generally, from all claims except such as might arise from the gross negligence or default of the agents or officers of the company.

We have examined all the cases cited upon both sides of this question, and pondered them, anxiously desiring to recognize a rule which, while it shall not perplex and injure the commercial interests of the country, shall, at the same time, protect the carrier's interest, or, at least, be of so much service to it that the proprietors of that interest may know and understand the full extent of their obligations to the public.

So long ago as 1860, this court, in the case of this same company against Copeland, 24 Ill. 332, 76 Am. D. 749, expressed a decided partiality for the rule in Muschamp's case, 8 Mees. & Wels. 421, so much relied on by the appellee, and in which case all the authorities, English and American, were fully examined, and we said, though this point was not in the case, we were inclined to yield to the force of the reasoning of the English courts, on principles of public convenience, if no other, and to hold, when a carrier receives goods to carry, marked to a particular place, he is *prima facie* bound to carry to, and deliver at that place. By accepting the goods so marked, he impliedly agrees so to do, and he ought to be answerable for the loss.

Again, in the case of the same company against Johnson, 34 id. 389, there was an express understanding to transport the goods to Wheeling; but the court, referring to Copeland's case, *supra*, considered that case as holding that a carrier who receives goods to carry, marked to a particular place, was bound to carry to, and deliver at that place; that it was an agreement implied from the mark or direction on the goods, and accepting them so marked, that the liability arose.

Now, on the point of public convenience, which consideration had great weight with us in determining which rule should be adopted, it seems to us that consignors of the productions of our country, or other property, by railroad, should not be required, in case of loss or damage, to look for remuneration to any other party than the one to which they delivered the goods. It would be a great hardship, indeed, to compel the consignor of a few barrels of flour, delivered to a railroad in this State, marked to

New York city, and which are lost in the transit, to go to New York, or to the intermediate lines of road, and spend days and weeks, perhaps, in endeavors to find out on what particular road the loss happened, and, having ascertained it, in the event of a refusal to adjust the loss, to bring a suit in the court of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance, as the responsible party, and the intermediate roads its agents to carry and deliver; and it is the most reasonable and just, for all railroads have facilities, not possessed by a consignor, of tracing losses of property conveyed by them, and all have, or can have, running connections with each other. Above all, when it is considered the receiving company can, at the outset, relieve itself from its common-law liability by a special and definite agreement, such a rule cannot prejudice them. The rule being known, all parties can readily accommodate their business to it, and no inconvenience can result to any one from its operation.

In the case of the *Illinois Central R. R. Co. v. Morrison*, 19 Ill. 136, there was a formal stipulation under hand and seal, by which the consignor, for a valuable consideration, agreed to release the company from their common-law liability as carriers.

In *Adams Express Co. v. Haynes*, 42 id. 90, it was said, if a shipper takes a receipt for his goods from the company, with a full knowledge of its terms and conditions, intending to assent to the restrictions contained in it, then it becomes his contract as fully as if he had signed it.

By such a contract, the rights and duties of the parties to it must be governed; and if the stipulations in it go to limit the common-law liability, and they plainly appear in the instrument, and are not covertly inserted in it, and are understood by the consignor, then it must be enforced as any other contract of parties made in good faith.

Testing this case by these considerations, the receipt or bill of lading executed by appellants and accepted by the consignors, reciting, as it does, that the goods in question were consigned to Pana, and charges paid to that point, and that appellants should not be liable for loss or damage save on their own road, amounts to a special contract, relieving the company from their common-law duty.

It is a question for the jury to determine, whether the terms of the receipt were understood by the consignors and assented to by them. If they were, they are bound by them.

The fact that the charges were guaranteed from Pana, was not for the benefit of appellants, but for the benefit of the connecting

LOUISVILLE, ETC., RAILROAD CO. v. WILSON. §§ 68, 69

road, whose usage was to decline the receipt of perishable articles, as these were, unless the charges were guaranteed.

We think justice would be promoted by sending this cause back for trial, in the light of the views here presented, and of the rule we think necessary to be established for the government of all such transactions, and for that purpose reverse the judgment and remand the cause.

LAWRENCE, MCALISTER and THORNTON dissented from this opinion.

Judgment reversed.

69. LOUISVILLE, EVANSVILLE & ST. LOUIS RAILROAD CO. V. WILSON.

119 Ind. 352, 21 N. E. R. 341. 1889.

Action to recover \$2,700 excess freight on lumber. Freight was charged according to a public circular, but plaintiffs claimed an oral agreement with the general freight agent to continue to carry for plaintiffs at a former and lower rate.

MITCHELL, J. (After stating the facts.) It is to be observed that the complaint was framed and that the action proceeded to judgment upon the theory that the ties were shipped under an oral agreement, by the terms of which the railroad company bound itself to carry the plaintiff's freight at the rate of \$14 per car-load. The action is to recover for overcharges made in disregard of this agreement. The proof, however, shows, without any contradiction whatever, that the shipments were made—with possibly some exceptions, in which cases bills were delivered after the shipments had been made—pursuant to written and printed bills of lading, signed by the company's agent and delivered to the shipper before the transportation began, in each instance.

The question presented at the threshold, therefore, is, was it competent for the plaintiffs, without alleging any fraud, concealment or mistake, to recover upon an oral contract made prior to the issuing of the bills of lading, which are supposed to set forth the terms and conditions upon which the goods were to be transported, or must the rights of the parties be determined by the express terms and legal import of these instruments? A bill of lading is twofold in its character. It is a receipt, specifying the quantity, character and condition of the goods received; and it is also a contract, by which the carrier

agrees to transport the goods therein described to a place named, and there deliver them to a designated consignee upon the terms and conditions specified in the instrument. *The Delaware*, 14 Wall. 579; *O'Brien v. Gilchrist*, 34 Me. 554, 56 Am. D. 676; 2 Am. and Eng. Encycl. Law, 228; *Chandler v. Sprague*, 5 Met. (Mass.) 306, 38 Am. D. 404, and note; *Friedlander v. Texas & Pac. R. W. Co.*, 130 U. S. 416, 9 Sup. Ct. Repr. 570.

So far as a bill of lading is in the nature of a receipt, or an acknowledgment of the quantity and condition of the goods delivered, it may, like any other receipt, be explained, varied, or even contradicted; but as a contract, expressing the terms and conditions upon which the property is to be transported, it is to be regarded as merging all prior and contemporaneous agreements of the parties, and, in the absence of fraud, concealment or mistake, its terms or legal import, when free from ambiguity, cannot be explained nor added to by parol. *Snow v. Indiana etc. R. W. Co.*, 109 Ind. 422, and cases cited.

“Such a contract is to be construed, like all other written contracts, according to the legal import of its terms.” It becomes the sole evidence of the undertaking, and all antecedent agreements are extinguished by the writing. *Lawson Contracts of Carriers*, § 113; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. R. 224; *Southern Ex. Co. v. Dickson*, 94 U. S. 549; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. R. 475. Thus, in *Snow v. Indiana, etc., R. W. Co.*, *supra*, the shipper of a car-load of horses, who had received a bill of lading in which no route was designated by which the car was to be forwarded after leaving the initial carrier's line, offered to prove that a particular line had been agreed upon. It was held that the silence of the bill of lading in the respect mentioned was the same in legal effect as if a provision had been inserted therein authorizing the first carrier to select, at its discretion, any customary or usual route which was regarded as safe and responsible, by which to forward the car, and that the provision thus imported into the bill of lading was no more subject to be assailed by parol than was any of the express terms of the contract. The cases which affirm this principle are very numerous. They proceed upon the theory that, in the absence of express stipulation, certain terms are or may be annexed to every contract by legal implication, and that stipulations thus imported into a contract become as effectually a part of the written agreement as though they were expressed therein in terms. *Long v. Straus*, 107 Ind. 94, 6 N. E. R. 123, 57 Am. R. 87; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288; *Hill v. Syracuse, etc., R. R. Co.*, 73 N. Y. 351,

29 Am. R. 163. Thus, where, in a written contract for the sale of property, no time is fixed for the payment of the purchase-price, the law implies that the price is to be paid upon the delivery or transfer of the property, and the purchaser, without alleging fraud or mistake, would not be heard to prove by parol that the sale was made on credit. An apparent exception to the general rule occurs when proof of an agreement collateral to that contained in the bill of lading is offered. *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77; *Lawson Contracts of Carriers*, § 115.

As we have seen, all the bills of lading contain a stipulation to the effect that the cross-ties are to be transported over the defendant's road, and that they are to be delivered as therein specified, upon payment of freight and charges in par funds. In some of them the amount to be paid is not fixed, while in others the charges actually collected were inserted in the bills of lading before they were delivered to the plaintiffs, and before the ties were transported. Surely there can be no ground of recovery where the amount actually collected was stipulated in the bills of lading beforehand. Nor was it competent to give evidence of an oral agreement concerning the amount of freight to be paid, with a view of establishing a right of recovery in respect to those bills of lading in which the amount was not fixed in express terms. The bills of lading must be regarded as complete contracts into which all the oral negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported. While it is true, the contract of a common carrier to transport goods is equally binding whether it be by parol or in writing (*Mobile, etc., R. W. Co. v. Jurey*, 111 U. S. 584), no good reason can be suggested in support of a rule which should declare that part of the contract might be in writing, and part, covering the same subject-matter, by parol. Either the bill of lading must be regarded as the sole repository of the agreement of the parties, in respect to the terms upon which the shipments were made, or it must be regarded as a receipt, and nothing more. As a contract, a bill of lading, like other written contracts, is presumed, in the absence of imposition or mistake, to embody the entire agreement of the parties. *Lawson Contracts of Carriers*, sections 112, 113; *Long v. New York, etc., R. R. Co.*, 50 N. Y. 76.

The bills of lading involved in the present case cover every subject of the contract of shipment, except that some of them are silent as to the amount of freight to be paid. If, in the absence of an agreement, the law supplies this term by implication,

then the writings constitute complete contracts, and parol evidence is inadmissible to vary, control or contradict the terms therein expressed, or those which the law certainly implies. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339; *Pemberton Co. v. N. Y. Central R. R. Co.*, 104 Mass. 144.

The law makes it the duty of every common carrier to receive and carry all goods, seasonably offered for transportation, and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly, or customarily, paid for other like services. *Johnson v. Pensacola, etc., R. R. Co.* 16 Florida, 623, 26 Am. R. 731; *Angell Carriers*, section 392; *Lawson Contracts of Carriers*, section 125.

Whether a railroad company may, in the absence of legislation, agree upon different rates of compensation for similar services for different persons, is a question we need not consider in the present case. *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Spofford v. Boston, etc., R. R. Co.*, 128 Mass. 326; *Ragan v. Aiken*, 9 Lea. 609, 42 Am. Rep. 684.

Without regard to the rights of the shipper and carrier, as they may appear under special contracts, the agreement which the law imports into every bill of lading which does not stipulate the price to be paid for the service is, that the compensation shall be reasonable, and such as is customarily charged others for like service under like conditions. *London, etc., R. W. Co. v. Evershed*, L. R. 3 App. Cases, 1029. This is the contract which the law makes for the parties, and which is imported into every bill of lading which contains no express stipulation covering the subject of the amount to be paid. The conclusion which follows is, that in the absence of an express agreement in respect to the amount to be charged written in the bills of lading, the law implies that the amount shall be the reasonable or customary charge. It is neither averred nor proved that the amount collected was unreasonable, or more than the usual or customary charge for like services. The plaintiffs were, therefore, not entitled to recover.

The judgment is reversed, with costs, with directions to the court to sustain the motion for a new trial.

70. MUNN V. ILLINOIS,

94 U. S. 113. 1876.

Action against Munn and Scott, owners of a grain elevator in Chicago, for failing to take out a license under a statute passed by the legislature in pursuance and under authority of an article of the constitution of Illinois, and for charging for storage more than the rates fixed by such statute. The defendants were found guilty and fined \$100, and this was affirmed by the supreme court of Illinois. Munn & Scott sued out writs of error to this court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sec. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states;"

2. To that part of sec. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and

3. To that part of amendment 14 which ordains that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect

which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislature of the states.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. Rutland & B. R. R. Co.*, 27 Vt. 143, 62 Am. D. 625; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government,

and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sec. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essen-

tial element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has “a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king’s subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable.” So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says:

“A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, passage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage,

wharfage, pesage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Allnutt v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537) :

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539) :

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down

by Lord Hale in the passage referred to (that from *De Portibus Maris* already quoted), which includes the good sense as well as the law of the subject."

And in the same case Le Blanc, J., said (p. 541):

"Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge:

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode

in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads and other kindred subjects." *Mobile v. Yuille*, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:

"And whereas divers wagoners and other carriers, by combination among themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by

steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn-keeper, or the wharfinger, or the baker, or the cartman, or the

hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must

also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates

at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

Judgment affirmed.

71. In *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. R. 462, 702 (1889), the court considered the power of a Railroad and Warehouse Commission, constituted by the Legislature of Minnesota, to regulate the charges for carrying milk to St. Paul. Mr. Justice Blatchford, speaking for the court, said, among other things (p. 456):

“The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad com-

pany is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was

not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Mr. Justice Bradley (Justices Gray and Lamar concurring) vigorously dissented (p. 461):

"I cannot agree to the decision of the court in this case. It practically overrules *Munn v. Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration; and is usually de-

§§ 71, 72 RIGHTS AND DUTIES OF COMMON CARRIER.

terminated by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so declared by statute; implied, by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitration is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing), has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there."

72. CHICAGO AND NORTHWESTERN RAILWAY CO. V. JENKINS.

103 Ill. 588. 1882.

Trover for conversion of a consignment of paper held for demurrage. Judgment for plaintiff.

WALKER, J. It appears that Noyes & Messenger, a business firm in Chicago, had consigned to them a quantity of paper, from Clinton, Iowa, by the road of appellant. It arrived at its depot in Chicago on the 4th of July, 1872. The consignees were afterwards notified of its arrival. On the 11th of that month they paid the freight and removed one dray load, but the company refused to deliver the balance of the paper until the consignees should pay five dollars a day for each day it remained on the track after twenty-four hours from the time of its ar-

rival, which was claimed for demurrage. This the consignees refused to pay, and after a demand and refusal, brought trover to recover damages for its conversion. The defendant pleaded the general issue.

The case remained on the docket in this condition until in April, 1874, when Noyes & Messenger were declared bankrupts by the United States District Court, and appellee was appointed assignee of their estate, and the requisite assignment was made to him. No further action was taken in the case until on the 12th day of April, 1878, when, with the leave of the court, the company filed a plea that the plaintiffs had been adjudged bankrupts. Jenkins thereupon filed his petition for leave to be substituted as a party plaintiff, and to be permitted to prosecute the suit, and the substitution was made, and the leave granted by the court. (Passing over questions of practice.)

It is claimed that appellant had the right to hold the property until its charges for demurrage were paid,—that they were a lien on the property, and it was not required to make delivery until they were paid. The claim is based on rules and regulations adopted and published by the company. It will be conceded that all liens are created by law, or by contract of the parties. Where the law gives no lien, neither party can create it without the consent or agreement of the other. Noyes & Messenger were therefore not bound by these rules unless they assented to them when the contract for shipping the goods was entered into by the parties, and such a contract is not claimed. But it is insisted that as the rules were public, and generally understood, it must be presumed they assented. For the purpose of creating such a lien on property the law will never indulge such presumptions. There is no evidence or agreement that either the consignor or consignee ever had notice or knew of such regulations. But even if they had, unless they agreed to be bound by them the rule could create no such lien.

We held in the case of Illinois Central R. R. Co. v. Alexander, 20 Ill. 23, that railroad companies, when they had carried goods to their destination, if not removed by the consignee might store them in their warehouses, and thus terminate their liability as common carriers, and thereby assume the relation and liabilities of warehousemen. To the same effect is the case of Richards v. Michigan Southern and Northern Indiana R. R. Co. id. 404; and in the case of Porter v. Chicago and Rock Island R. R. Co. id. 407, 71 Am. D. 286, it was held it was their duty to do so, or remain liable for loss as common carriers. It was held in the former of these cases, that when stored, and they had placed the goods in their warehouse, they were entitled

§§ 72, 73 RIGHTS AND DUTIES OF COMMON CARRIER.

to charge the customary price for such services, and on such charges being paid or tendered, and a refusal by the company to deliver on demand, it became liable for a conversion.

The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freight. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

73. SCOFIELD V. RAILWAY CO.,

43 Ohio St. 571; 54 Am. R. 846. 1885.

Injunction to prevent the collection of freights. Relief granted below.

ATHERTON, J. The main question in this case, and to which all others are subordinate, is this:

Has the defendant a right to discriminate between its freighters and customers, and furnish transportation to one at a less rate than to others, in a case where such discrimination is injurious to and destructive of the legitimate business of others?

That ultimate question requires the consideration of several other propositions and queries, some of which may be stated as follows:

1. What were the rights and duties of common carriers at common law, and was the shipper entitled to have his goods shipped at a rate equal to that charged to others, or was he entitled to any protection other than to have his goods transported for a reasonable compensation?

2. What changes, if any, have been made by statute in this State touching the duties and liabilities of a common carrier at common law?

3. Is the contract made between the defendant and the Standard Oil Company, and mentioned in the pleadings, good in law, or is it void on grounds of public policy?

4. Can the remedy sought by plaintiffs in this case be administered by a court of equity by means of an injunction?

The District Court has found that the defendant is a consolidated railroad company owning and operating a railroad extending from Buffalo, New York to Chicago, Illinois, passing through Ohio and parts of Pennsylvania, Indiana, Michigan and Illinois, with branches extending to Detroit and Grand Rapids, and that defendant is a public corporation and a common carrier in the business of transporting persons and property for hire and reward over its line and branches.

The defendant having acquired through its charter the right of eminent domain and the franchise to construct its road, and to demand and receive tolls, is to be distinguished from a mining or manufacturing or other private corporation. By accepting its charter, and claiming and exercising the peculiar rights and privileges enjoyed by public corporations, and "being a creature of the law and intrusted with the exercise of sovereign power to serve public necessities and uses, the defendant is bound to conduct its affairs in furtherance of the public objects of its creation."

The legal theory seems to be that it is the duty or the right of governments to provide improved facilities for the public travel and transportation at the public expense, and this duty has been discharged by all civilized governments. It was found that these improved modes of travel and transportation could not always be provided by private enterprise, and that to construct canals, turnpikes, railroads, etc., required the exercise of the right of eminent domain, and the powers of general taxation. In the further progress of events as private wealth increased, it was found politic and convenient to intrust these functions of the government to individuals united together as public corporations under a grant of the government; the railroad corporation in consideration of the franchise received, giving the public the right to use its road, and subjecting itself to the restraint of the government through its legislature and judiciary to prevent any abuse of the powers so granted.

"While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted. In cases of apparent conflict between the rights and powers conferred and the duties imposed, the solution may

oftentimes be rendered easy by regarding the admitted right of public use as the touchstone of judicial interpretation." *Railroad Comm. v. P. & O. C. R. Co.*, 63 Me. 269-278, 18 Am. R. 208.

It is because of the fact that such corporations are public corporations, being vested with a portion of sovereign power delegated to them by the State, and owing duties to the public, that they have been held subject to the right of mandamus to oblige them to fairly and fully carry out the public object of their creation. *Rex v. Barker*, 3 Burr. 1267; *State v. R. Co.*, 29 Conn. 538; *Ang. & Ames Corp.* 694.

It is on the same theory that acts of the legislature have been sustained as constitutional, requiring railroad corporations to establish stations at particular places on their roads, and to supply reasonable accommodations to the people of the smaller localities, and to do justice to the different sections through which their railroads pass. *Commonwealth v. Eastern R. Co.*, 103 Mass. 258, 4 Am. Rep. 555.

The fact that parties using the road are required to pay fare for transportation in no way conflicts with the views expressed.

"The fare is the consideration for the service performed, whether done by the State directly, or by a corporation under a grant from the State; it is simply a substitute for the tax rendered necessary when the State builds and conducts railroads at the public expense; the corporation upon the payment of the fare is under the same obligation to render the required service for the public, that the State would be, if railroads were free and conducted by State authority. Nor does the ownership of railroads, whether it be in the State or a private corporation, affect the nature of their use, since in either case the function to be exercised and the uses to be subserved are public." *Railr. Comm. v. P. & O. C. R. Co.*, *supra*, 275, 18 Am. R. 208.

"In considering the right of the public to the use of railroads, and the public interest resulting from this right, it should not be overlooked that the payment of fares is more than compensated in general by the reduced expense of travel and transportation by this mode over other means of conveyance, in addition to the other advantages, public, private and local, resulting from the establishment of railroads. * * * This beneficial public interest is intended, among others, to be secured under the franchise granted to railroad corporations; and the public have an interest that this result should be attained and maintained by them." *Railr. Comm. v. P. & O. C. R. Co.*, *supra*, 276-7, 18 Am. R. 208.

A similar doctrine is stated by the Supreme Court of Pennsylvania: "Whenever a charter is granted for the purpose of

constructing a railroad, and the corporation is clothed with the power to take private property in order to carry out the object, it is an inference of law from the extent of the power conferred, and subject-matter of the grant, that the road is for the public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men and denied to others." *Sandford v. Railroad Co.*, 24 Penn. St. 378.

The learned Chief Justice BEASLEY, in pronouncing the judgment of the Supreme Court of New Jersey, said: "In my opinion, a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier * * * but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the State, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a State should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. * * * In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must in the exercise of their calling observe to all men a perfect impartiality." *Messenger v. Penn. R. Co.*, 36 N. J. Law, 407, 13 Am. R. 457.

"A railroad corporation, in view of its origin, objects, uses and the control of the government over it is a public corporation, though its shares may be owned by private individuals. It is a governmental agency for public purposes." *Talcott v. Township of Pine Grove*, 1 Flip. 120. See also *McDuffee v. P. & R. Co.*, 52 N. H. 430, 13 Am. R. 72.

The defendant's attorneys in their brief well said: "It cannot be questioned that the reason why a common carrier is restricted to a reasonable rate is the same that causes the limitation at common law upon the rates charged by a wharfinger licensed under the statute. In reference to a railroad company

it may be truly said that it exercises a *quasi* public employment. While railroads are managed for private benefit, and their profits arising from their operation go to individuals, yet they are treated as merely a public convenience and agency in the matter of State and inter-State commercial intercourse." And see *Erie & N. E. Railroad v. Casey*, 26 Penn. St. 287.

The above authorities abundantly show that railroad companies are common carriers, receiving from the State a delegation of a portion of its sovereign powers for the public good. That being public agents, and in the place and stead of the government exercising public duties, they are therefore subject to the legislative and judicial authority to correct the abuse of their privileges and powers.

The next question is, whether these *quasi* public agents are required to treat all citizens and customers alike as to terms upon which they will transport freight.

It is claimed by the defendant that it is not bound to carry freights for all freighters at the same rate, but its duty is fully discharged if it carries for all, charging none more than a reasonable rate. On the contrary, the plaintiffs contend, that at least under the facts of this case, they are entitled to the same rates as their more favored rival. They allege and the court find that they have been and are carrying on in a large way, at Cleveland, Ohio, the business of refining crude petroleum, and selling it in the region reached by the defendant's railroad, branches and connecting lines. That they have a large capital so employed, and have established a large and profitable trade throughout such territory. That their refinery cost about \$70,000, and that plaintiffs have a refining capacity of about 150,000 barrels per year. And it is contended, and the facts would seem to establish, that the admitted difference of ten cents a barrel between the rate charged plaintiffs and that charged the Standard Oil Company would make to the plaintiffs, if there was no discrimination practiced, a yearly sum of \$15,000 on the output of plaintiff, or more than twenty-one per cent on the capital used in their business. That the Standard Oil Company is and has been engaged in the same business at Cleveland and elsewhere, and has manufactured and shipped nine-tenths of all the oils manufactured at and shipped from Cleveland, and that by the terms of an agreement entered into in 1875, the defendant contracted with the Standard Oil Company that in consideration of the promise of the company to ship all their product of petroleum over the defendant's railroad, it undertook to ship the same at an average rate of about ten cents per barrel below its published rates; and that plaintiffs were com-

pelled to pay at the same time according to the published rates. Plaintiffs claim that by this discrimination in favor of the Standard Oil Company, the latter are afforded an unfair discrimination and advantage, and can put their product on the market at a less price than the plaintiffs can afford, and thereby their profits are reduced; and by this unlawful discrimination in favor of the Standard Oil Company, the defendant is inflicting upon them great and irreparable damage, and renders it impossible to successfully compete with that company in the market, and thereby the business and trade of plaintiffs is being injured and destroyed. It will be observed that the gist of plaintiff's contention is not so much that the latter are charged a rate of compensation for transportation unreasonable in itself, as that by charging a lower rate to their more favored competitor, the latter is enabled to and is supplying the market at a price with which the plaintiffs cannot compete, and thus driving them out of the market and destroying the business and trade they have built up. One of the questions at issue between the parties is: What was the doctrine of the common law on the question of the compensation of a common carrier? Could the freighter require any thing more than that he be charged no more than a reasonable compensation, or could he demand and have his goods transported at an equal rate with the favored customer?

In many cases it has been held that the customer was only entitled to have his goods shipped at a reasonable rate, and not necessarily at an equal rate with others; and that he was not interested in the matter that somebody else was charged less. Or in the incisive language of CROMPTON, J., to counsel in an English case: "The charging another person too little is not charging you too much."

The question, so far as it related to railroads, was settled by statute in England shortly after their introduction there; and under the "equality clause" of the English statutes railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances. *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; *Baxendale v. London & South-western R. Co.*, L. R., 1 Ex. 137; *London, etc., R. Co. v. Evershed*, 3 App. Cas. 1029, 26 W. R. 863.

And by 17 and 18 Vict., ch. 31, §§ 2, 3 and 6, the Court of Common Pleas was empowered to restrain by injunction any railway or canal company from giving undue or unreasonable preference to any particular person or description of traffic. See notes to *Coggs v. Bernard*, 1 Smith L. C. 369. So for a long period of time the English courts have had no occasion to exam-

ine the condition of the common law upon the subject independent of the statute.

In *C. & A. R. Co. v. People*, 67 Ill. 11, 17, 16 Am. R. 599, LAWRENCE, C. J., affirms: "Another perfectly well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. * * * While the law now imposes, and always has imposed upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls at its own discretion and without regard to justice," etc.

In discussing the English "equity statute" before adverted to, BEASLEY, C. J., pronouncing the opinion of the Supreme Court of New Jersey, says: "But the courts of Pennsylvania repeatedly declared that this act was but declaratory of the doctrine of the common law. * * * In a more recent decision, Mr. Justice STRONG says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are 'but declaratory of what the common law now is.' This is the view which for reasons already given, I deem correct." *Messenger v. Penn. R. Co.*, 36 N. J. Law, 407-412, 13 Am. R. 457.

In some of the cases it is announced that the question of whether the law requires the common carrier to transport goods upon equal terms at all, or whether it only requires that the rate shall be reasonable, but not necessarily equal to all, has been differently determined by the courts of England and America. *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684.

But be that as it may, the tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with *quasi* public duty to transport merchandise on equal terms for all parties, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored.

"An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others, is void as creating an illegal preference." *Messenger v. Penn. R. Co.*, *supra*.

The court also cite and make extracts from *McDuffee v. Railroad*, *supra*; *Garton v. B. & E. R. Co.*, 1 B. & S. 112; *Sandford v. Railroad*, 24 Penn. St. 378; *Shipper v. Railroad*, 47 Penn. St. 338; *Audenried v. Railroad*, 68 Penn. St. 370, 8 Am. Rep. 195; *N. E. Ex. Co. v. Railroad*, 57 Me. 188, 2 Am. R. 31; *Vincent*

v. Railroad, 49 Ill. 33; Chicago, etc., Ry. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Dinsmore v. Railroad, 2 Fed. Rep. 465; Crawford v. Wick, 18 Ohio St. 190, 98 Am. D. 103; Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Great West. Ry. Co. v. Sutton, 4 Eng. & Ir. App. 226.

Five cases, reported in 10 Fed. Rep. 210, were decided before Justice MILLER and Judges McCRARY and TREAT, arising in the various Circuit Courts of the United States for Mississippi, Arkansas, Kansas and Colorado; and Justice MILLER on p. 214, states as the fifth point in his opinion:

"I am of the opinion that it is the duty of every railroad company to provide such conveyances by special cars or otherwise, * * * as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business."

The case of Hays v. Pennsylvania Company, 12 Fed. Rep. 309, decided by BAXTER, J., in the Circuit Court of the United States for the northern district of Ohio, is important in respect to one element in this case. The defendant in the case at bar claims that it was proper to enter into the contract it did with the Standard Oil Company, on account of the very large amount of freightage that company annually furnishes, and that it was lawful to discriminate in their favor on that account. The plaintiffs in that case had been engaged for several years in mining and shipping coal from Salineville, and the defendant's railroad furnished them their only means of getting their coal to market. The railroad company discriminated in favor of every shipper who shipped five thousand tons or over, and the discrimination was from thirty to seventy cents per ton, graduated by the amount shipped.

Plaintiffs were required to and did under the discrimination pay a higher rate than their more favored competitors. They brought suit to recover for the discrimination, and under the instructions of the trial judge the jury returned a verdict for plaintiffs.

The judge on a motion for a new trial said: "The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is in a qualified sense a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. * * *

The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during

the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man, engaged in mining coal and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and it may be not slow to make the most of their opportunities; and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else seeing the augmented power of capital organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claim by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

The District Court, in their finding 10½, state that shipment by the car-load was the manner in which nearly all business was done. That on the request of either party to furnish cars, the defendant had them switched to the refineries, and after being loaded they were switched back and placed on defendant's tracks for shipment on its road.

The manner of making shipments for plaintiffs and for the Standard Oil Company was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of BAXTER, J., as the better law, and hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be sustained. The principle is opposed to sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant recognized and enforced by the courts, what will prevent the great interests of the north-west, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, from driving to the wall all private enterprise struggling for existence, and with an iron hand thrusting back all but themselves?

The defendant can derive no benefit or advantage in this case from its contract with the Standard Oil Company, and its discrimination cannot be upheld because of the existence of the same.

We have already held that the contract is opposed to public policy and void. (Citing Crawford v. Wick, 18 Ohio St. 190, 98 Am. D. 103, and making extracts.)

Now let us look into this contract between defendant and the Standard Oil Company, and see just what it is as shown by the pleadings and findings in the case, and its aim and purpose as shown by the subsequent acts of the parties to it. Defendant having tariff rates for the public generally, in 1875, contracted with the Standard Oil Company, that in consideration of the company giving to the defendant its entire freight business in the products of petroleum, they would transport such freights for the company at certain rates dependent upon the fluctuation of the rates, but about ten cents per barrel cheaper than for any other customers; and the defendant not only agreed and undertook to carry for the company at the reduced rate, but also that they would not ship for any others at less than the full tariff rate, and if they did it was understood that the Standard Oil

Company would take from the defendant all its business and deprive it of all its patronage. The understanding was to keep the price down for the favored customer, but up for all others, and the inevitable tendency and effect of this contract was to enable the Standard Oil Company to establish and maintain an overshadowing monopoly, to ruin all other operators and drive them out of business in all the region supplied by the defendant's road, its branches and connecting lines. The active participation of the defendant, in the unlawful purposes of the Standard Oil Company, is shown by the sequel. In 1883, the road of the N. Y., C. & St. L. R. Co. was constructed. It might become an active competitor for this business of transporting petroleum for customers other than the Standard Oil Company. It might establish such a tariff of rates that other operators in oil might successfully compete with the Standard Oil Company. If however the contract of 1875 was in force, the defendant had an exclusive right to all the freights of that company. Having that exclusive right to do all the carrying for the company, the District Court found, "that for the purpose of effectually securing at least the greater part of said trade, the defendant on the completion of the N. Y., C. & St. L. Railway, a competing line from Cleveland to the west, in the year 1883, entered into a traffic arrangement with it giving to it a portion of the shipments of said Standard Oil Company west, on a condition of its uniting with it in carrying out of such understanding as to reduced rates to said Standard Company, which arrangements still exist." How peculiar? The defendant, by a contract made in 1875, was entitled to all the freights of the Standard Oil Company, and yet say the District Court, "for the purpose of securing the greater part of said trade," they entered into a contract to divide with the new railroad, if the latter would only help to keep the rates down for the Standard and up for everybody else.

Such a contract so carried out was, in the opinion of this court, not only contrary to a sound public policy, but to the lax demands of commercial honesty and ordinary methods of business.

Defendant's counsel in his brief affirms: "We do not believe a railroad company should act unjustly; that it should favor one man more than another; that it should favor one place more than another place, or that it should crush out one person for the purpose of advancing the fortunes of another." We affirm that admitted doctrine, and upon it declare that contract void.

The cases before referred to, New England Express Company v. Maine Central Railroad Company; Sanford v. Railroad Com-

pany; *Messenger v. Pennsylvania Co.*, all enforce and emphasize the doctrine that prevents the defendant from in any way intrenching itself behind its arrangement with the Standard Oil Company. Neither of the parties to it can enforce its terms against the other. It is void in law, and a void thing is no thing.

Neither does the fact found by the District Court, that the contract "was not made or continued with any intention on the part of the defendant to injure the plaintiffs in any manner," make any difference in the case. The plaintiffs were not doing business in 1875, when the contract was entered into, and of course it was not made to injure them in particular. If a man rides a dangerous horse into a crowd of people, or discharges loaded firearms among them, he might with the same propriety, select the man he injures, and say he had no intention of wounding him. And yet the law holds him to have intended the probable consequences of his unlawful act as fully as if purposely directed against the innocent victim, and punishes him accordingly. And this contract, made to build up a monopoly for the Standard Oil Company and drive its competitors from the field, is just as unlawful as if its provisions had been aimed directly against the interests of the plaintiffs.

The effect of the provisions of the Ohio statutes upon the case at bar do not seem to have been much relied on by plaintiff's counsel. I think they can at least be looked to as indicative of the tendency and direction of the legislative policy of the State upon questions we are investigating.

(Omitting this consideration.)

The defendant in this case relies for its defense not only upon the doctrine so frequently found in the books declaring that common carriers are to be held to a reasonable compensation, but not necessarily an equal compensation, but particularly on the cases of *Johnson v. Pensacola & Perdido R. Co.*, 16 Fla. 623, 26 Am. Rep. 731, and *Ex parte Benson*, 18 S. C. 38, 44 Am. R. 564.

In the latter case a petition was filed against the receiver of a railroad to compel him to pay to a shipper out of the "receiver's fund" an amount that had been promised as a drawback to procure his custom as a cotton shipper. The receiver contested the claim on the ground that the discrimination was unlawful, but no person was shown to have been injured by, and no third person was complaining of the discrimination. Under that state of facts the shipper had judgment for his drawback.

In the Florida case the discrimination was made in favor of a shipper of lumber who under peculiar circumstances had furnished the railroad company a sum of money to complete its road

and was to have the loan repaid by freight at a reduced rate. Complaints of loss and injury were made by another shipper, but there was no proof or no satisfactory evidence to show the complaining shipper was injured in his business by the lower rate given to the other shipper. In both these cases reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate not necessarily equal to all; and in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions. But if we should regard them as contrary to the doctrine we have indorsed, we would only say they would thus be overcome by an overwhelming weight of authority.

I think however that all the cases that have been referred to on their facts might be harmonized by observing the distinction so often alluded to, that is to say, that as between a consignor and the common carrier, where no other reason intervenes to engraft an exception on the rule, all the consignor can demand of the common carrier is, that his goods shall be carried at a reasonable rate, not necessarily at an equal rate with all others. But when the reduced rate is either intended to, or has a natural tendency to injure the plaintiff in his business and destroy his trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped "under like circumstances." We can perhaps fully agree with defendant's counsel, and with what he says in his brief:

"The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one, unless it be shown that unreasonable inequality has been made to his detriment."

In the Florida case, *supra*, the court say, "most of the cases treat the common-law rule strictly as between the parties, and without comparison as to the charges against others."

The double aspect in which a case of discrimination is to be viewed is well stated in the case of *St. L., A. & T. H. R. Co. v. Hill*, 14 Bradw. 579, by BAKER, J.: "The statement, one is a common carrier, *ex vi termini*, imports a duty to the public, and a corresponding legal right in the public; a right common to all. One of the duties imposed upon the common carrier is, that he is bound to carry for a reasonable remuneration, and is not allowed to make unreasonable and excessive charges. He cannot, like a merchant or mechanic, consult his pleasure or caprice in the conduct of his business, and cannot even by special agreement receive an excessive and extortionate price for his services. Another duty imposed on him is to make no unjust, injurious, or

arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the carrier is a common right belonging to every one alike."

Of a like tenor and effect is *Ragan v. Aiken*, *supra*, where the question as to statutory regulation and the rules of the common law were before the court. The railroad company or its manager, to induce parties doing business in a particular locality, and who could send by a different route, offered to carry their goods for fifteen cents per one hundred. They accepted the proposition and shipped accordingly. The complainants were charged more, as were the balance of the public along the line of the road. They charged that this discrimination was illegal, and as in this case, prayed an injunction.

(Omitting extracts. It was held that only unreasonable inequalities were unlawful.)

The doctrine here formulated will, in my opinion, reconcile all the cases upon their facts (though not perhaps all the judges have said in them), and make them consistent.

The question further presented is, if the plaintiffs have a right to relief, can they come into a court of equity and obtain it by the extraordinary remedy of injunction; and a further question is proposed by the District Court, whether section 3373 of the Revised Statutes was intended to apply to cases like the present, and if so, whether under it there is any authority for the relief of injunction. Waiving the first question for the present, we affirm the law to be that if the right of the plaintiffs existed at common law to relief by injunction, the enactment of section 3373, if that section applies to the case at all, affords only a cumulative remedy, and that such a remedy by statute would in no wise take away the remedy at common law.

So independent of the statute, we proceed to inquire whether the plaintiff has a remedy by injunction. In the case of *Sandford v. R. Co.*, *supra*, and *C. & A. R. Co. v. People*, *supra*, relief was sought and afforded by injunction.

In the case of *McDuffee v. Railroad*, *supra*, the court say, p. 451: "There might be cases where the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual, on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continual grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law." See also 1 Pomeroy Eq.

254, 255; Dodge v. Gardiner, 31 N. Y. 239; Third Ave. R. Co. v. New York, 54 N. Y. 159; Woods v. Monroe, 17 Mich. 238.

We think the authorities abundantly show that in a case like the one at bar the plaintiffs can seek relief by injunction, and that it is an appropriate method to determine the rights of the parties here without first resorting to an action at law. The plaintiffs have a manufacturing capacity of 150,000 barrels per year. Shall they be compelled to bring a separate action for each car-load? What number of suits would it require? Are the damages of plaintiffs for loss of profits susceptible of easy proof, or even capable of any exact estimation? We think the plaintiffs have a clear and undoubted right to come into a court of equity and have the rights of the parties determined in a single action.

A further question is presented, whether the decree for plaintiffs should be limited to and enforced only in this State, or shall it extend to and be enforced against the defendant at all points reached by defendant's railroad, its branches and connecting lines? The District Court finds that the defendant is a consolidated company, its lines of roads extending from Buffalo to Chicago, and extending to various points in Pennsylvania, New York, Ohio, Indiana, Michigan and Illinois. It is an artificial person, and the same person in all this territory, and this court has acquired jurisdiction of the person of the corporation, and the right to enforce all proper orders against it.

A similar question was determined by the Supreme Court of New Hampshire in McDuffee v. Portland and Rochester R. Co., *supra*.

That was an action brought in the courts of New Hampshire for an unreasonable discrimination practiced on that part of the railroad situate in the State of Maine, and on demurrer it was claimed the action could not be sustained, because the acts complained of happened in the State of Maine.

(Omitting extracts holding that the court had jurisdiction of the whole case.)

The railroad is an entirety, whether within the State or without, and the artificial person, by the acts of the several States authorizing consolidation, has been created one, and not two or more; and no reason is perceived why it may not be dealt with by the courts of either State that has procured jurisdiction.

This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of plain-

tiffs in its rates to points thus reached. Of course it may at any time refuse to make any rates beyond its own lines, but if it makes rates to points on connecting lines, the rates should be equal to all. The order of the court is that the defendant be restrained, as prayed for in plaintiff's petition.

Judgment accordingly.

Compare with this *Cleveland etc. Railway Co. v. Closser*, 126 Ind. 348; 25 N. E. R. 159; 22 Am. St. R. 593, and *Cook v. Railway Co.*, § 74 *post*.

74. COOK V. CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY CO.,

81 Ia. 551; 46 N. W. R. 1080; 25 Am. St. R. 512. 1890.

Action on the common law duty of common carriers. From the judgment for plaintiff both parties appealed.

ROTHROCK, C. J. . . . It appears that one E. R. Clapp was an employee of the defendant. He was located at Des Moines, and was known among shippers of live-stock as the Iowa stock agent of the defendant. Clapp was frequently along the railroad in conference with shippers of live-stock. He held this position during the time that the plaintiffs made the shipments set forth in their petition. There were a number of shippers of live-stock in and about Newton, the principal station on the defendant's road in Jasper County. During nearly the whole time covered by this action, the tariff rate for shipment of live-stock from Newton to Chicago was sixty dollars per carload. It was practically the same from the stations next east and west of Newton. There was at times a slight difference, but not enough to be a material fact in the case. The freight charges, as given by the defendant to its station agents, were, for the most of the time, sixty dollars per car-load, and this rate was given out by station agents to shippers as the charge made by the defendant. All of the car-loads sent forward by all the shippers were billed by the agents at the full rate given out by the company. The stock was shipped in the usual manner. No part of the freight charges were in any case paid at the place of shipment. The cars were billed to commission houses at the Union stock-yards. The stock was sold by the commission men, and after taking out their commission and paying the freight, the balance of the proceeds of the sales were remitted to the shipper. This was the uniform manner of transacting the business. All of the shippers were dealt with in exactly the same manner until the stock was sold, and the regular freight

charges paid. There was no difference in the manner of the service. All of the shippers were given the same kind of cars, and the stock shipped by the plaintiffs was conveyed in the same kind of trains, and on the same time, and with the same privileges as to the free transportation of one or more men to take care of the stock while in transit. In short, the plaintiffs had no preference over other shippers in any respect. It appears without conflict that at least three other firms or individuals engaged in the same business at the same place, and in competition with the plaintiffs, had private and secret agreements with Clapp, the said stock agent, by which they were paid a rebate of from three to twenty dollars on each car-load shipped. These agreements were not uniform at all times. The amount to be paid varied just as the parties were able to agree upon the terms. So far as appears, Clapp always performed the contracts. He paid the rebates sometimes in currency, at other times by sending the money to the shippers by express. There were short intervals during the time that no rebates were paid. But these intervals were the exception and not the rule. And Clapp always exacted a promise from the favored shippers that the fact of the payment of rebates must be kept secret. We have not made a careful estimate of the number of car-loads shipped by the favored shippers. Indeed, no exact estimate could be made from the evidence. It is shown, however, beyond all question, that not less than eighteen hundred car-loads, in the aggregate, were shipped by the favored shippers. The plaintiffs made application to Clapp for better terms, and were refused. He invariably stated in most positive terms that no rebates nor concessions were allowed to any of the plaintiffs' competitors. The referee found that the plaintiffs were entitled to recover on part of the shipments at the rate of three dollars per car, and on others at five dollars, and on the remainder at the rate of ten dollars per car. The aggregate amount found to be due, including interest, was \$2,733.98. If the plaintiffs are entitled to recover on the ground of unjust discrimination, the evidence shows beyond all controversy that the judgment is not excessive. Indeed, we do not understand appellant's counsel to claim that the judgment is excessive.

The real question in the case is, Do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is un-

reasonable. In Story on Bailments, sec. 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood on Railroads, 566, it is said: "A mere discrimination in favor of a customer is not unlawful, unless it is an unjust discrimination." In 2 Redfield on Railways, 95, the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will, by the arbitrary discrimination in his prices. Hence it was held, at an early day, that all that could be required on the part of the owner of the goods by way of compensation was, that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively." In Hutchinson on Carriers, 243, after a review of the cases, it is said: "Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact unreasonable

rates, or to make unjust discriminations between shippers which, in effect, compels one shipper to pay an unreasonable rate.

The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms-giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is, that some of the others shipped less than the plaintiffs. In short, there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Is it to be supposed that any court or jury under this state of facts would solemnly find, declare, and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is, that after deducting the rebate the rate was reasonable, and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question. On the contrary, and in support of our conclusion, see *Sharpless v. Mayor*, 21 Pa. St. 147, 59 Am. Dec. 759; *New England Exp. Co. v. Maine etc. R'y Co.*, 57 Me. 188, 2 Am. Rep. 31; *McDuffee v. Portland etc. R'y Co.*, 52 N. H. 430, 13 Am. Rep. 72; *Messenger v. Pennsylvania R'y Co.*, 36 N. J. L. 407, 13 Am. Rep. 457.

2. It is claimed in behalf of appellant that the payments by the plaintiff were voluntarily made, and cannot be recovered back. It is true, the money was paid without duress of person or goods, but it was paid, not only without knowledge that it was a wrongful exaction, but in the belief of the truth of the positive assertions of Clapp that no shipper was allowed any

rebate. That such a payment is not voluntary, see 1 Parsons on Contracts, 466, and Heiserman v. Burlington etc. R'y Co., 63 Iowa 732, 18 N. W. R. 903.

* * * * *

Modified and affirmed.

75. GIBSON V. STURGE,

10 Exchequer 622. 1855.

Action for freight claimed to be due on a cargo of wheat from Odessa to Gloucester and measured at Odessa 2664 quarters. The wheat was shipped on board the vessel while in quarantine in an open roadsted, out of barges. The vessel proceeded direct to Gloucester, where she arrived on the 1st of December, 1852, when the cargo was claimed by the defendants under the bill of lading. On unloading the vessel, the corn was measured, in the presence of the defendants, by the Custom-house authorities, at the Queen's beam, and was found to contain 2785½ quarters, the freight for which would be 1022*l.* 19*s.* 5*d.* In the course of the voyage, a large portion of the corn, from some cause, of which there was no evidence, became heated and damaged. The defendants paid to the plaintiffs 978*l.* 8*s.*, being the freight upon 2664 quarters, but refused to pay the balance now claimed, on the ground that the heated corn had increased the bulk, and that they were only liable to pay for the invoice quantity shipped at Odessa. The corn was afterwards dried, when it was found to weigh less than the quantity shipped.

The learned Judge ruled that the defendants were liable to pay freight for the quantity of corn delivered; and a verdict was found for the plaintiffs for the amount claimed, leave being reserved to the defendants to move to enter a nonsuit.

(MARTIN, B., delivered an opinion in favor of computing freight on the measurement at the port of delivery.)

PLATT, B.—Freight has been well defined to be the price payable for the carriage of goods from the port of loading to their port of discharge. In ordinary cases it does not become payable before the completion of the voyage and of the carriage of the goods to their destination. From the very nature of the transaction, the goods shipped are alone subject of the carriage, and for the carriage of them alone from the port of shipment to the port of discharge is the freight payable. In conformity

with these plain propositions they are described in the bill of lading as shipped in good order and condition on board the particular vessel, lying in a particular place, and bound on a particular voyage from thence to a specified port, and as to be conveyed on that voyage and delivered in like good order and condition at such port. They must be shipped at the port of departure and thence carried the whole way to the port of discharge; and unless they are carried from the beginning to the end of the voyage the freight is not earned.

But it is suggested, that the computation of the freight upon any other measurement than one taken at the port of delivery, would impose hardship on the owners, who might, by reason of their receiving the cargo from boats in a roadstead, be unable to ascertain the number of quarters taken on board. It seems, however, to me, to be the duty of the master to ascertain, at the time of loading, the quantity he receives; and the difficulty in his so doing appears to be purely imaginary, as it can hardly be supposed that the number of cubic feet which his vessel is competent to afford for the stowage of grain could be unknown to him, so that he could not ascertain the cubic bulk of such a commodity as grain when stowed.

The difficulty, however, never could arise in the present case; for, upon the facts raising the question for the Court's decision, the quantity shipped was known, and the owner contended, that, although they received and during the *whole* voyage have carried that quantity only, yet, as by reason of the moisture having in the course of that voyage so operated upon the grain as to increase its bulk, they are entitled to profit by that increase, and claim freight according to the capacity of the cargo at the port of discharge; or, in other words, to be paid freight not only for the grain shipped, but also for the water which they have allowed to incorporate with it, and the increased bulk resulting from that incorporation. Such a mode of payment would plainly offer a premium to negligence in the treatment of a cargo of this description during the voyage.

In this case the bulk received at the port of loading was the only bulk carried during the whole of the voyage; wherefore I think the freight should have been computed upon the measurement at that port, and not at the port of discharge; and that the rule obtained by the defendant should be made absolute.

ALDERSON, B.—In this case I have also the misfortune to differ with my learned Brother Martin as to the conclusion at which he has arrived, and I shall state very shortly my reasons for so doing. The contract for freight in this case is a contract for

carrying a certain cargo of corn from Odessa to England. The amount put on board at the port of loading was less by a certain number of bushels than the amount delivered at the port of discharge. Now, if the rule be, that, in the absence of any special stipulations, the freight is due for that quantity which has been carried for the whole voyage, as I think it is, it seems to me to follow as a necessary consequence, that the less amount alone falls within that category. It is true, perhaps, that the same individual grains are carried throughout, but they measure more in bulk on their arrival than at their loading. The case seems to me to be in close analogy to that of the pregnant females mentioned in Molloy, Bk. 2, Chap. 4, s. 8, where no freight is payable for the infants of whom they are delivered during the voyage. And, again, where freight is contracted for the transporting of animals, and some die during the voyage, the freight is payable only for those which arrive safe. And, again, where goods, as in the case of molasses, have wasted in bulk during the voyage, freight is payable for the amount which arrives. These are admitted cases. Now, all these cases can only, as it seems to me, be reasonably explained on the principle, that, in such cases, the freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant.

It is said, that this will be found inconvenient in practice. If it be so, it may easily be obviated by an express stipulation. But the rule as it stands obviates an evil on the other side—that of suffering the owner of the ship to gain by the want of care on the part of his master and crew; for it may be that corn shipped dry on board may, by the incautious or careless admission of water, be deteriorated in quality and increased in bulk, so that, whilst there is a loss from the deterioration to the merchant, the shipowner may, from the increased bulk, have a benefit. This would be wrong as well as inconvenient; and the rule proposed by my learned Brother would be open to this consequence. For these reasons I cannot agree in the conclusion at which he has arrived.

POLLOCK, C. B.—It is unnecessary further to allude to the facts of this case, which have been fully and clearly stated by my Brother Martin, from whose view of the subject I very reluctantly differ, as I think that his opinion on such a matter (a question of commercial law) is entitled to the highest respect. But, on the best consideration I can give to the subject in dispute between the parties, I am of opinion that the rule ought to be made absolute, as I think that the defendant has paid all that the plaintiff was entitled to demand; and that the claim

to be paid freight for the increased bulk, which the wheat acquired during the voyage, cannot be sustained.

The remote cause of the increased bulk of the wheat does not appear; but there is little doubt about the immediate cause. It is clear, that there was not a real increase of the commodity; it was an apparent increase only. From some cause (unknown) the wheat, during the voyage (it may be during the last two or three days of the voyage), probably imbibed a quantity of water, which made it occupy a larger space; and the shipowner claims to be paid freight for the water imbibed during the voyage (and possibly the last two or three days of it), as well as for the wheat that was shipped on board and carried the whole voyage. It may be conceded, that the cause of this is one for which the plaintiff is not responsible; but, on the other hand, it must be admitted that (whatever it was) it was not one for which the defendant was responsible; in this respect the parties stand on an equal footing; and I agree with my Brother Martin, that our decision ought to be founded on some principle, not imputing in this respect any blame to either party.

The first question is—Is this claim supported by the terms of the bill of lading? And it appears to me that it is not. From the terms of the bill of lading I infer that freight was to be paid for the commodity *shipped, carried and delivered*; and that all these must concur to create a title to freight. If shipped and carried, but not delivered, freight would not be payable; so, I think, if delivered, but not shipped, freight would not be payable; and this agrees with the decisions (very few in number, and none of them precisely in point), which are to be found in the books on the subject of increase or decrease (during the voyage) of the article to be carried. I agree, that the bulk or weight, as appearing at the port of destination, may be *prima facie* the criterion of the freight to be paid; but, when it is proved that *that* test is fallacious and untrue, and that the real quantity shipped was a different and smaller quantity (as the jury in this case have actually found), then I think that the freight ought to be calculated upon the true quantity shipped; and in my judgment the captain's ignorance of the true quantity (as expressed in the bill of lading) cannot entitle him to charge freight according to a false estimate: whether the actual quantity be stated and admitted in the bill of lading, or the contents are stated to be unknown, appears to me to make no difference as to the principle which ought to govern our decision. But it does appear to me to be contrary to the principles of natural justice, that the ship-owner should acquire a right to demand more freight, and the owner of the goods become liable

to pay more freight, in consequence of a circumstance which is an injury to the goods, and which has occurred to them while they were in the care, custody, and keeping of the shipowner, or those who represent him; over the causes of which the owner of the goods has *no* control, but some of the possible causes of which are considerably, or entirely, under the control of the captain and the crew.

I apprehend no one can entertain any doubt, that, if the water which has caused the apparent increase were capable of separation from the wheat originally shipped, the defendant would be entitled to reject it, and to accept and pay freight for the wheat freed from this injurious addition. In the case of a cargo of sponge shipped dry, and to be paid for by weight at the end of the voyage, the consignee might surely squeeze out all the water imbibed during the voyage (if any), and pay for sponge only. It seems to me, that the right to demand, and the liability to pay, additional freight, in a case where the goods have received a damaging (but only an apparent) increase, cannot turn on the mere difficulty of separation. If it can be accurately known and ascertained what ought to be separated, though the separation cannot be made, it is known what ought to be deducted from the claim of freight, and the deduction (which is possible) ought to be made. Here the measure of the wheat shipped was known and has been proved,—all beyond that is water; and though the water cannot be separated, the amount of freight charged for the water can be ascertained, and, I think, ought to be deducted from the claim founded on the mere measurement at the port of discharge or delivery; and I think it is no answer to this, to say, that in many cases the quantity shipped would be unknown, or would be ascertained with difficulty. Deal with those cases as justice or convenience may require, but do not exclude the truth, where accessible, because you cannot always obtain it. If the experience of commerce has discovered that the measurement at the port of destination was the most convenient, and had established it by usage and custom, the parties would have been bound by it, and the point would not have come before us for our decision. From there being no evidence of any such usage or custom, I infer that there is no such custom; and that, therefore, there is no such convenience as ought to be the foundation of a custom, or as ought to influence our decision in establishing a rule for the first time. But, it is manifest, that a cargo of wheat may be increased in bulk (and to the great injury of the cargo) by the fraud or negligence of the captain and crew; and I think that laws ought to be framed, and the decisions of Courts of law (as far as possible) ought to be founded, on the

§§ 75, 76 RIGHTS AND DUTIES OF COMMON CARRIER.

same principles as we have no doubt prevail in the moral government of the universe, that, as far as possible, duty and interest should not be opposed to each other. I think it would be dangerous and mischievous to give a shipowner a right to charge more freight for an injurious alteration in the commodity carried, which he or his agents have always the means in their own hands of producing.

I am, therefore, of opinion, that freight for this increase of bulk cannot be claimed under the bill of lading; and I think it cannot be claimed on any principle recognized by the common law. I think there is no contract, express or implied, to pay it.

Rule absolute.

76. UNION FREIGHT RAILROAD CO. V. WINKLEY,

159 Mass. 133; 34 N. E. R. 91; 38 Am. St. R. 398. 1893.

Action against a consignor of ice for the freight. Bills had been sent to the consignee, with a demand for payment of the freight.

FIELD, C. J. The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume, without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Boston and Maine Railroad make the contract for the transportation, and who promised that company to pay the freight? There was no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although as between themselves and Merrick he was bound to pay it, but they made no such contract in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself, or may be an agent for the owner and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee.

From the agreed facts, it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof: *Lawrence v. Minturn*, 17 How. 100; *Blum v. The Caddo*, 1 Woods, 64. In *Dicey on Parties to Actions*,

87, 88, the result of the English decisions is stated to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e., the person whose goods they are, and who would suffer if the goods were lost. *

* * When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And on page 90, note, "Where the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or the consignee may sue"; *Dawes v. Peck*, 8 Term Rep. 330; *Domett v. Beckford*, 5 Barn. & Adol. 521; *Coombs v. Bristol etc. Ry. Co.*, 3 Hurl. & N. 1; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Dunlop v. Lambert*, 6 Clark & F. 600; *Great Western Ry. Co. v. Bagge*, 15 Q. B. D. 625; *Cork Distilleries Co. v. Great Southern etc. Ry. Co.*, L. R. 7 H. L. 269. The cases generally are collected in *Hutchinson on Carriers*, secs. 448, et seq., 720, et seq. Most of the English cases were reviewed in *Blanchard v. Page*, 8 Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that, although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage unless he was prohibited by his principal, and it was said that he would be liable for the freight. In *Wooster v. Tarr*, 8 Allen, 270, 85 Am. Dec. 707, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignees or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and a shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is *Finn v. Western R. R. Co.*, 102 Mass. 283, 17 Am. R. 128. (For this reference see *Finn v. R. R.*, *post* § 177.

Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the

§§ 76, 77 RIGHTS AND DUTIES OF COMMON CARRIER.

effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee who is the purchaser is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk and on his account, he also may be held liable, as the real principal in the contract: See *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. But whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties: See *Boston etc. R. R. Co. v. Whitcher*, 1 Allen, 497.

In the present case there was no bill of lading or receipt signed by the railroad company and accepted by the defendants. There was a waybill, but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company, and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight.

Judgment affirmed.

77. BRIGGS V. BOSTON & LOWELL RAILROAD CO.,

6 Allen (Mass.) 246; 83 Am. D. 626. 1863.

Trover for conversion of flour. Defendant appeals from judgment for plaintiff.

By Court, MERRICK, J. The plaintiff, who resides at Racine, in the state of Wisconsin, delivered the flour, the value of which he seeks to recover in this action, to the Racine and Mississippi

Railroad Company, taking from their agents a receipt, in which they agreed to forward and deliver it to Franklin E. Foster, at Williamstown, in this state. By mistake of the agents of that company, the flour was erroneously directed or billed to Wilmington, where there is a freight station on the road of the defendants. It was carried by the Racine and Mississippi company over their road, and at its eastern termination delivered to the carriers next in succession in the line and route from Racine to Wilmington. And it was thus transported by the successive carriers in that line and route in their vessels and cars respectively, according to the bills and directions under which it was forwarded from Racine, until it arrived in due time at Groton, the point of the commencement of the road of the defendants. And it was there received by them, they paying the freight earned by all the preceding carriers, and carried to Wilmington, where it was duly deposited in their freight depot. But Franklin E. Foster, to whom it was directed, did not reside or have any place of business at Wilmington, and the defendants were unable to find there any consignee who could be notified of its arrival, or to whom it could be delivered. The defendants' agents immediately instituted a diligent inquiry, but they could not ascertain where the consignee, or any other person entitled to have possession of the flour, was to be found, or could be notified. At the time of its arrival at Wilmington it was beginning to become sour, and would soon have greatly deteriorated in value. The defendants kept it on hand in store for about two months; and at the expiration of that time, being still unable to find either the owner or the consignee, and it being out of their power to procure a warehouse in which they could store it for a longer time, they caused it to be sold at public auction, and received the proceeds of the sale, which they have since retained in their possession.

Upon these facts, the plaintiff in the first place contends that as Williamstown was the place of destination of the flour under the directions which he gave to the Racine and Mississippi Railroad Company, and according to their agreement in the receipt given for it by them to him, the defendants had no right to receive the flour at Groton, and were guilty of the unlawful conversion of it to their own use by transporting it thence to Wilmington; although in such reception and transportation of it over their road they acted in good faith, and strictly in conformity to the bills and directions which were made and given by the agents of the Racine and Mississippi company, and by which it was regularly accompanied over each and all the lines and routes of the successive carriers.

§§ 76, 77 RIGHTS AND DUTIES OF COMMON CARRIER.

effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee who is the purchaser is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk and on his account, he also may be held liable, as the real principal in the contract: See *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. But whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties: See *Boston etc. R. R. Co. v. Witcher*, 1 Allen, 497.

In the present case there was no bill of lading or receipt signed by the railroad company and accepted by the defendants. There was a waybill, but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company, and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight.

Judgment affirmed.

77. BRIGGS V. BOSTON & LOWELL RAILROAD CO.,

6 Allen (Mass.) 246; 83 Am. D. 626. 1863.

Trover for conversion of flour. Defendant appeals from judgment for plaintiff.

By Court, MERRICK, J. The plaintiff, who resides at Racine, in the state of Wisconsin, delivered the flour, the value of which he seeks to recover in this action, to the Racine and Mississippi

Railroad Company, taking from their agents a receipt, in which they agreed to forward and deliver it to Franklin E. Foster, at Williamstown, in this state. By mistake of the agents of that company, the flour was erroneously directed or billed to Wilmington, where there is a freight station on the road of the defendants. It was carried by the Racine and Mississippi company over their road, and at its eastern termination delivered to the carriers next in succession in the line and route from Racine to Wilmington. And it was thus transported by the successive carriers in that line and route in their vessels and cars respectively, according to the bills and directions under which it was forwarded from Racine, until it arrived in due time at Groton, the point of the commencement of the road of the defendants. And it was there received by them, they paying the freight earned by all the preceding carriers, and carried to Wilmington, where it was duly deposited in their freight depot. But Franklin E. Foster, to whom it was directed, did not reside or have any place of business at Wilmington, and the defendants were unable to find there any consignee who could be notified of its arrival, or to whom it could be delivered. The defendants' agents immediately instituted a diligent inquiry, but they could not ascertain where the consignee, or any other person entitled to have possession of the flour, was to be found, or could be notified. At the time of its arrival at Wilmington it was beginning to become sour, and would soon have greatly deteriorated in value. The defendants kept it on hand in store for about two months; and at the expiration of that time, being still unable to find either the owner or the consignee, and it being out of their power to procure a warehouse in which they could store it for a longer time, they caused it to be sold at public auction, and received the proceeds of the sale, which they have since retained in their possession.

Upon these facts, the plaintiff in the first place contends that as Williamstown was the place of destination of the flour under the directions which he gave to the Racine and Mississippi Railroad Company, and according to their agreement in the receipt given for it by them to him, the defendants had no right to receive the flour at Groton, and were guilty of the unlawful conversion of it to their own use by transporting it thence to Wilmington; although in such reception and transportation of it over their road they acted in good faith, and strictly in conformity to the bills and directions which were made and given by the agents of the Racine and Mississippi company, and by which it was regularly accompanied over each and all the lines and routes of the successive carriers.

The same person may be, and often is, not only a common carrier, but also the forwarding agent of the owner of the goods to be transported: Story on Bailments, secs. 502, 537. He must necessarily act in the latter capacity whenever he receives goods which are to be forwarded, not only on his own line, but to some distant point beyond it on the line of the next carrier, or on that of the last of several successive carriers on the regular and usual route and course of transportation, to which they are to be carried and there delivered to the consignee. The owner generally does not and cannot always accompany them and give his personal directions to each one of the successive carriers. He therefore, necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty and invests him with authority to give the requisite and proper directions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place. For the first carrier can only transport the goods over his own portion of the line, and if he is not authorized to give the carrier with whose route his own connects, directions in reference to their further transportation, they must stop at that point; for although in general every carrier is bound to accept and forward all goods which are brought and tendered to him, yet he is not so bound unless he is duly and seasonably informed and advised of the place to which they are to be transported: Story on Bailments, sec. 532; *Judson v. Western Railroad*, 4 Allen, 520, 81 Am. D. 718.

Hence it results by inevitable implication that when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, he makes and constitutes the persons to whom he delivers them his forwarding agents, for whose acts in the execution of that agency he is himself responsible. And therefore, if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot in any sense be considered as wrong-doers, although they are carried to a place to which he did not intend that they should be sent. And in such case the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his own part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom which is now fully recognized and established as a proper and legal proceeding, he has

paid to the preceding carriers: *Stevens v. Boston and Worcester R. R. Co.*, 8 Gray, 266.

Applying these rules and principles to the facts developed in the present case, the conclusion is plain and inevitable. It is conceded by the plaintiff, and agreed by the parties, that the flour was carried by the Racine and Mississippi Railroad Company over their road, and was then delivered to the carrier with whose route their own connected, and was thence transported in strict compliance with and exactly according to the directions given by them and contained in the bills which they forwarded with and caused to accompany the flour over the whole route from Racine to Wilmington, by the several successive carriers, and among others by the defendants. The Racine and Mississippi company were the duly constituted forwarding agents of the plaintiff; and as the defendants acted under their authority, they rightfully received the flour at Groton and carried it to Wilmington. And having under that authority paid all the freight which had accumulated in the whole course of the conveyance, including that which had been charged by the forwarding agent, up to the time when they received the flour, they were, as soon as it was conveyed to and deposited in their own freight-house, entitled to a lien thereon for the entire freight thus paid and earned. And they cannot, either by the transportation of it under such circumstances over their own road, or by the detention thereof for the purpose of enforcing their lien upon it, be held to have unlawfully converted it to their own use.

This conclusion does not at all conflict with the decision in the case of *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54, upon which the plaintiff, in support of his position, chiefly relies. For there is an essential difference between the facts in the present and those which appeared in that case. There it was shown that the plaintiff, the owner of a parcel of flour, delivered it at Black Rock, on board of one of their canal-boats, to the Old Clinton Line Company, who gave for it bills of lading in duplicate, wherein they undertook and agreed to transport it to Albany, and there deliver it to Witt, the agent of the Western Railroad. The plaintiff sent one of these bills of lading to Witt, and the other to the consignee at Boston, thus reserving to himself the right and assuming the responsibility of giving to Witt the directions under which he was to act. The service which the Old Clinton Line Company was to render was exclusively in their capacity as common carriers. They had only to carry the flour to Albany, and there deliver it to Witt. They had no other duty to perform; no right to exercise any control over it for any other purpose. They were not, therefore, the

forwarding agents of the plaintiff, nor invested by him with any authority to give directions as to the further transportation of the flour, or to make any other disposition of it than its delivery to Witt. Yet upon its arrival in Albany, in consequence of the inability of Witt immediately to receive and take charge of it, the agents of the Clinton Line Company, without right, and in violation of their duty, shipped the flour to the city of New York, and from there to Boston, in the schooner *Lady Suffolk*, whose owners claimed a right to detain it under a lien upon it for the freight. But the court, upon the general principle that if a carrier, though innocently, receives goods from a wrong-doer without the consent of the owner, express or implied, he cannot detain them against the true owners until the freight or carriage is paid, determined that they had no lien upon the flour, and that their claim to that effect could not be sustained. But if they had been the forwarding agents of the owner, he would have been responsible for their acts, and his consent to the diversion of the property from its intended route of transportation would have resulted by implication from their directions, and the respective carriers would then have become entitled to hold it under a lien to secure payment of the freight. When the flour had been carried over their road to Wilmington, and deposited at that place in their warehouse, the defendants had, as has been shown above, a lien upon it for all the freight which had been earned in its transportation from Racine. But this gave them only a right to detain it until they were paid; not to sell it to obtain the remuneration to which they were entitled. In the case of *Lickbarrow v. Mason*, 6 East, 21, note, it is said by the court that an owner may sell or dispose of his property as he pleases; but he who has a lien only on goods has no right to do so; he can only detain them until payment of the sum for which they are chargeable. And the rule which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all other persons having the like claim upon property in their possession: *Jones v. Pearle*, 1 Strange, 556; 2 Kent's Com., 6th ed., 642; *Doane v. Russell*, 3 Gray, 382. It is in distinct recognition of this principle that the legislature have provided that when the owner or consignee of fresh meat, and of certain other enumerated articles, liable soon to perish for want of care, shall not pay for the transportation, and take them away, common carriers who have a lien thereon for the freight may sell the same without any delay, and hold the proceeds, subject to their own lawful charges, for the use of the owner. And

such also is the provision in relation to trunks, parcels, and passengers' effects left unclaimed at any passenger station of a railway company for a period of six months after arrival and deposit therein: Gen. Stats., c. 80, secs. 1, 2, 5. This enumeration of particular cases, in which the right to sell and dispose of certain goods and chattels transported is conferred upon common carriers, operates, according to a familiar rule of law, as a denial or exclusion of their right in all other instances.

None of the provisions of the statute referred to extends to the case of flour transported in barrels as an article of merchandise. And therefore the defendants had no authority under the statute, and no right at law, to sell the flour which belonged to the plaintiff, although they had a valid and subsisting lien upon it, and were unable to find, after diligent inquiry, where the person to whom it ought to be delivered resided or had his place of business, and there was danger of its becoming worthless by longer detention of it in their warehouse. And consequently, the sale which they made was an unlawful conversion of it to their own use, which renders them liable in an action of tort to the owner for its value, or rather for the value of all the right and interest which he at that time had in it, which is the merchantable value less the amount of the lien upon it. The plaintiff, therefore, may maintain this action, and is entitled to recover as damages the balance left after deducting from the sum which was the fair merchantable value of the flour at the time of the conversion, the amount for which, upon the principles before stated, they had a lien upon it, with interest from the time of demand, or the date of the writ. And as the sale was unlawful, the expenses incurred in making it cannot be proved for the purpose of diminishing the damages which the plaintiff ought to recover.

Judgment is therefore to be rendered for him. Unless the parties agree upon the amount, the cause must be sent to an assessor, or submitted to a jury, if either party requires it, to assess the damages.

78. RUCKER V. DONOVAN,

13 Kan. 251; 19 Am. R. 84. 1874.

Replevin by Donovan to recover turpentine and coal oil from Rucker, a constable. On judgment for plaintiffs, Rucker took the case up on error.

BREWER, J. This was an action of replevin brought by de-

fendants in error in the District Court of Bourbon county. The testimony is not in the record, and the case is before us on the pleadings, the findings, and judgment. The petition alleges an absolute ownership. The findings show that the goods were in the possession of Rucker as constable by virtue of proper and legal process against the firm of L. E. Conner & Co. Plaintiffs' title was based upon an attempted exercise of the right of stoppage *in transitu*. The findings are, that plaintiffs at St. Louis sold the goods to Conner & Co., and shipped them to Fort Scott; that Conner & Co. were then insolvent, and that this insolvency was unknown to plaintiffs; that the goods never came into the possession of Conner & Co., but were taken by the constable from the carrier by virtue of his process; and that the constable paid the freight-charges, and also that plaintiffs demanded possession of the goods from the constable before suit, and while they were in his possession, but did not pay or tender the freight-charges. These are all the facts upon which the court based its conclusions of title and right of possession in the plaintiffs. The first finding shows a passage of the title from plaintiffs to Conner & Co.; and a reinvestment in plaintiffs of title and right of possession is claimed only by virtue of an exercise of the right of stoppage *in transitu*. Now, the mere insolvency of the vendee does not of itself amount to a stoppage *in transitu*; there must be some act on the part of the vendor indicative of his intention to repossess himself of the goods. 1 Parsons on Contr. 478; 2 Kent, 543, and cases cited in notes. Actual seizure of the goods before they come into the hands of the vendee is not essential. A demand of the carrier, or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. No particular form of notice and demand is required. See same authorities. This right can be exercised only during the transit, and before delivery, actual or constructive, to the vendee. But a seizure by an officer under legal process in favor of some other creditor does not destroy the right. Smith v. Goss, 1 Camp. (N. P.), 282; Buckley v. Furniss, 15 Wend. 137; Aguirre v. Parmelee, 22 Conn. 473; Wood v. Yeatman, 15 B. Monr. 270. Demand must be made of the party in possession. It is not sufficient to make demand of the vendee. Whitehead v. Anderson, 9 M. & W. 519; Mottram v. Heyer, 5 Denio, 629. Applying these rules to the facts of this case and it appears that the transit had not ended; the goods were in possession of an officer holding legal process in favor of another creditor; demand was made of the party in actual possession. It would seem therefore that the right of stoppage *in transitu* was not gone, and that the plaintiffs took the necessary steps to assert

that right. But it is insisted by counsel that this stoppage *in transitu* is simply the exercise of a lien by the seller, and not a rescission of the sale; that the petition alleges absolute ownership while the findings only show the existence of a lien, a variance that is fatal to the action. It must be conceded that the great weight of authority supports the claim of counsel in reference to the nature of stoppage *in transitu*, though there is far from absolute unanimity on the question. But it does not appear that any objection was made to proof of this kind of interest in the property under the general allegation of ownership; no motion for a new trial was made, nor does it appear that the attention of the District Court was called to this variance, and it is one of those discrepancies which under almost any circumstances might properly be corrected at the trial by an amendment of the petition. As it does not appear by exception or otherwise that the findings are against the evidence, we could not order a new trial, but must direct the judgment that ought to be entered. It does not seem to us therefore that we ought to disturb the judgment upon that ground.

One question more remains for consideration. The constable paid the freight-charges when he took possession of the goods from the carrier. These charges were neither paid nor tendered to him before the suit was commenced. Who then had the right of possession at that time? Clearly the officer. The lien for charges was prior to the claims of creditors, or the rights of the vendor. 2 Kent, 541; Oppenheim v. Russell, 3 Bos. & Pul. 42. The carrier's possession could not be disturbed until they were paid. The officer was justified in paying them, and having paid them was substituted to all the rights of the carrier. Before his possession then could be disturbed he must be reimbursed the money by him thus advanced. Now, the gist of the action of replevin is the right of possession. Town of LeRoy v. McConnell, 8 Kan. 273. Of course, questions of title may also arise, but the action can never be maintained against any one having the right of possession. The constable having the right of possession was entitled to judgment. He should not be subject to the expenses of a litigation which was not rightfully commenced. The law will protect the possession in him until these charges are paid. Having retained the property, the value of this possession need not and could not properly be determined, nor could any judgment be rendered for the return of the property, or the recovery of the value thereof, or the value of the possession. All that could properly be done was to render judgment in his favor for costs. Such a judgment, upon this ground alone, we are compelled to direct the District court to

enter, and the case will be remanded for that purpose. We have in this opinion discussed questions other than the one necessary to be considered, in order that there might be no dispute hereafter as to the matters decided and disposed of between these parties by this case.

All the Justices concurring.

79. NEW JERSEY STEAM NAVIGATION CO. V. MERCHANTS' BANK OF BOSTON,

6 Howard (U. S.) 343. 1848.

Mr. Justice NELSON. This is an appeal from the Circuit Court of the United States, held in and for the District of Rhode Island, in a suit originally commenced in the District Court in admiralty, and in which the Merchants' Bank of Boston were the libellants, and the New Jersey Steam Navigation Company the respondents.

The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents running between New York and Providence, which took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about four miles off Huntington lighthouse, and between forty and fifty miles from the former city.

The District Court dismissed the libel *pro forma*, and entered a decree accordingly. An appeal was taken to the Circuit Court, where this decree of dismissal was reversed, and a decree entered for the libellants for the sum of \$22,224, with costs of suit.

The case is now before this court for review.

William F. Harnden, a resident of Boston, was engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose, he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of \$250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers between New York and Providence a wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown,) until the 31st of December following, subject to these conditions:—

1. The crate with its contents to be at all times exclusively at the risk of said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c., to be conveyed or transported by him in said crate, or otherwise in the boats of said company.

2. That he should annex to his advertisements published in the public prints the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading:—

“Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time.”

This arrangement expired on the 31st of December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question.

A few days previous to the loss of the *Lexington*, the libellants employed Harnden in Boston to collect from the banks in the city of New York checks and drafts to the amount of about \$46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect and send home the same in the usual way. Eighteen thousand dollars of this sum was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libellants, and was on board at the time she was lost, on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libellants to recover:—

1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made.

2. That if the suit can be maintained in the name of the libellants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and,

3. That the District Court had no jurisdiction, the contract of freightment not being the subject of admiralty cognizance. We shall examine these several objections in their order.

I. As to the right of the libellants to maintain the suit. They had employed Harnden to collect checks and drafts on the banks in the city of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with the respondents for its conveyance, except what

was derived from the possession in the execution of his agency. The general property remained in the libellants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them.

This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of this description of goods, the result would not be changed, so far as relates to the right of property.

The carrier has a lien on the goods for his freight, if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. (Story on Bailments, § 93, *g*.)

(After deciding that the action was properly brought in the name of libellants.)

The cases are numerous in which the general owner has sustained an action of tort against the wrong-doer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuitry of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent.

We think, therefore, that the action was properly brought in the name of the libellants.

II. The next question is as to the duties and liabilities of the respondents, as carriers, upon their contract with Harnden. As the libellants claim through it, they must affirm its provisions, so far as they may be consistent with law.

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

The question is, to what extent has this agreement qualified the common law liability?

We lay out of the case the notices published by the respondents, seeking to limit their responsibility, because,—

1. The carrier cannot in this way exonerate himself from duties which the law has annexed to his employment; and,

2. The special agreement with Harnden is quite as compre-

hensive in restricting their obligation as any of the published notices.

A question has been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of *Gould and others v. Hill and others*, 2 Hill, 623, and the conclusion arrived at that he could not. See also *Hollister v. Nowlen*, 19 Wend. 240, 32 Am. D. 455, and *Cole v. Goodwin*, ib. 272, 282, 32 Am. D. 470.

As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property,—the safe custody and delivery of the goods,—we are unable to perceive any well-founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.

But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister v. Nowlen*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

The burden of proof lies on the carrier, and nothing short

of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage.

The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands.

This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailm. § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. (13 Wend. 611, 627, 628.)

Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation.

This rule, we think, should govern the construction of the agreement in question.

If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties.

The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or

by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case with a view to the question.

There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along side of the boiler-deck, and around the steam-chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.

The fire broke out in the cotton next the steam-chimney, between the two decks, at about half past seven o'clock in the evening, and was discovered before it had made much progress. If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard a-port, for the purpose of heading her to the land. In this act, one of the wheel-ropes parted, being either burnt or broken, in consequence of which the hands had no longer any control of the boat.

Some of them then resorted to the fire-engine, but it was found to be stowed away in one place in the vessel, and the hose belonging to it, and without which it was useless, in another, and which was inaccessible in consequence of the fire.

They then sought the fire-buckets. Two or three only, in all, could be found, and but one of them properly prepared and fitted with heaving lines; and, in the emergency, the specie-boxes were emptied, and used to carry water.

The act of Congress (5 Statutes at Large, 306, § 9) made it the duty, at the time, of these respondents to provide, as a part of the necessary furniture of the vessel, a suction-hose and fire-engine, and hose suitable to be worked in case of fire, and to carry the same on every trip, in good order; and further provided, that iron rods or chains should be employed and used in the navigation of steamboats, instead of wheel or tiller ropes.

This latter provision was wholly disregarded on board the vessel during the trip in question; and the former also, as we have seen, for all practical or useful purposes.

We think there was great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton; especially, regarding its exposure to fire from the condition of the covering of the boiler-deck, and the casing of the steam chimney. The former had been on fire on the previous trip, and a box of goods partly consumed. Also,

§§ 79, 80 RIGHTS AND DUTIES OF COMMON CARRIER.

for the want of proper furniture and equipments of the vessel, as required by the act of Congress, as well as by the most prudential considerations.

(After deciding that the court had jurisdiction.)

It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested.

We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.

Upon the whole, without pursuing the examination farther, we are satisfied that the decision of the Circuit Court below was correct, and that its decree should be affirmed.

Justices CATRON, DANIEL and WOODBURY also delivered opinions.

80. CHICAGO AND NORTHWESTERN RAILWAY CO.,
APPELLANT, V. THE PEOPLE EX REL.
HEMPSTEAD,

56 Ill. 365; 8 Am. R. 690. 1870.

LAWRENCE, C. J. This was an application for a mandamus, on the relation of the owners of the Illinois river elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago river, north of Kinzie street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukee division of the road, running in a north-westerly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has

also a depot on the south branch, near Sixteenth street, which it reaches by a track diverging from the Galena line, on the west side of the city. The map indicates a line running north from Sixteenth street the entire length of West Water street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren street.

Under an ordinance of this city, passed August 10, 1858, the Pittsburgh, Fort Wayne and Chicago company, and the Chicago, St. Paul and Fond du Lac company (now merged in the Chicago and Northwestern company), constructed a track on West Water street, from Van Buren street north to Kinzie street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne and Chicago company laid the track from Van Buren to Randolph street, and the Chicago, St. Paul and Fond du Lac company that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren street to Kinzie, and do, in fact, use it in common. The elevator of the relators is situated south of Randolph street and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie street; the Munn & Scott on West Water street, between the elevator of relators and Kinzie street; the Union and City

near Sixteenth street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago river. The Munn & Scott elevator can be reached only by the line laid on West Water street under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a draw-bridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukee division of respondent's road, thence taken to the track on West Water street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the draw-bridge, with only a single line, four times, and, as averred in the return, subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water street freight coming over that division of the road. The doctrine of *The Vincent* case, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been re-affirmed in an opinion filed at the present term, in the case of *The People ex rel. Hempstead v. The Chicago and Alton Railroad Co.*, 55 Ill. 95. But in the last case we have also held that a railway company cannot be compelled to deliver beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukee divisions, running north-west, and the Galena division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water street

seems to have been laid for the convenience of the Wisconsin and Milwaukee divisions. It would be a harsh and unreasonable application of the rule announced in *The Vincent* case, and a great extension of the rule beyond any thing said in that case, if we were to hold that these relators could compel the company to deliver, at their elevator, grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road.* As to such grain the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukee divisions of respondent's road, we find a very different state of facts. The track on West Water street is a direct continuation of the line of the Wisconsin and Milwaukee division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits, in explicit terms, that it has an equal interest with the Pittsburgh, Fort Wayne and Chicago railroad in the track laid in West Water street. It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions, is that those divisions connect with the line on West Water street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the use of motive power, labor and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this

line on West Water street in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage, by the fact that they can be reached only by crossing the river.

We presume, however, from the argument, that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukee divisions are concerned. They rest the defense on the contracts made between the company and the elevators above named, for exclusive delivery to the latter, to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator upon its lines, and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the supreme court of the United States, and the supreme court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said, that "a common carrier is in the exercise of a sort of public office." *N. J. Steam Nav. Co. v. Merch. Bank*, 6 How. 381; *Sandford v. Railroad Co.*, 24 Penn. 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Cer-

tain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel, that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods, for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed, that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say, it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen against his will and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by

the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating, that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit, without reference to the pecuniary welfare of the company itself. We hold, simply, that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in *The Vincent* case, 49 Ill., and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukee divisions of respondent's road. The only difference between this and the *Vincent* case is, in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the

State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses is a deliberate policy to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott, in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the re-

spondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago to whom it might be sent, and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk, to be delivered only at the elevator of Munn & Scott, and nowhere else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent au-

thorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of *The City of Chicago v. Rumpff*, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretense of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals, in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus was held void. *Marriott v. L. & S. W. R. Co.*, 87 Eng. Com. Law, 498.

In *Garton v. Bristol & Exeter Railroad Company*, 95 Eng. Com. Law, 641, it was held that a contract with certain iron mongers to carry their freight for a less price than that charged the public was illegal, no good reason for the discrimination being shown.

In *Crouch v. The L. & N. W. R. Co.*, 78 Eng. Com. Law. 254, it was held a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In *Sandford v. Railroad Company*, 24 Penn. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say: "If the company possesses this power, it might build up one set of men and destroy others, advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to *Rogers' Locomotive Works v. Erie R. R.*

§§ 80, 81 RIGHTS AND DUTIES OF COMMON CARRIER.

Co., 20 N. J. Eq. 380, and *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will, therefore, lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road as well as to the Wisconsin and Milwaukee division. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We, therefore, make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion.

Judgment reversed.

81. JUDSON V. WESTERN RAILROAD CORPORATION,

4 *Allen (Mass.)* 520; 81 *Am. D.* 718. 1862.

Action on a contract of carriage for goods lost by fire in defendant's warehouse.

By Court, MERRICK, J. It is, undoubtedly, a general rule that the liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception, when they are in a fit and proper condition and ready for immediate transportation: *Redfield on Railways*, 246. But like all other general rules, it is subject to modifications resulting from the express stipulations of the parties, or from the course and usages of trade and business. And as it sometimes happens that a party is at once a warehouseman and a carrier, and that goods received by him are lost and destroyed before they are put *in itinere*, a very important question may in such case arise, whether the receiver is liable in the one or the other capacity; for his responsibility is not co-extensive in each of those relations: *Story on Bailments*, sec. 535. This must always be a question of fact to be determined upon proof of the actual and surrounding circumstances, the material point of inquiry being whether the one or the other character predominated

in the particular stage of the transaction when the disaster occurred: *Id.*, sec. 536. There are well-settled rules which will afford some aid in the solution of such a question. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods: *Id.*, sec. 536; *Fitchburg and Worcester R. R. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427. But on the contrary, if the goods, when so deposited, are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them, by the owner or consignor, the deposit must be considered to be in the mean time for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman.

These being the rules by which the rights of the parties are to be determined, it can of course make no difference by whom the property is delivered, whether it be by the owner himself, or by his agent or servant, nor whether that agent be himself a carrier or acts in any other capacity. It is the paramount duty of a common carrier to receive and carry all goods offered him for transportation, upon the payment or tender of a suitable fare or compensation; and he must so receive them, by whomsoever they are brought to the place where he makes arrangements to receive them for transportation: *Story on Bailments*, sec. 508. It is upon this principle, where no special obligation is imposed by acts of legislation, that one corporation whose railroad connects with or is near to the termination of the railroad of another corporation is obliged to accept and receive for transportation any goods which may be brought and tendered to it by the servants of the latter. But in this as in all other cases the party bringing the goods must first do whatever is essential to enable the carrier to commence or to make needful preparations for commencing the service required of him, before he can be made liable or subjected to responsibility in that capacity. When goods are received by a railroad company which are to be transported to a place beyond their own road over a railroad which connects with theirs, or over successive roads or lines of transportation, each company will be responsible for them while in its own possession, and will not be liable for any loss which may occur after a due delivery of them upon another line and to another carrier: *Nutting v. Con-*

necticut River R. R., 1 Gray, 502. If after being once laden for carriage they are transported over successive roads in the same car or vehicle without being shifted or changed from one to another, the successive carriers, as they severally receive them, will be liable for the goods in that capacity as soon as delivered; so that during the whole transit or journey some one will be constantly liable for them as a common carrier. But it is otherwise when one has performed his whole duty as a carrier, and has relieved himself from all liability in that capacity, by depositing the goods at the end of the journey in his own warehouse, from which they are to be taken by the owner or consignee, or by other carriers who are to continue the transportation to a still distant point. In such case, the liability of a warehouseman will succeed, and will continue until they come into the possession of some one who is responsible as a common carrier: *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray, 263, 61 Am. Dec. 423; *Garside v. Trent and Mersey Nav. Co.*, 4 Term. Rep. 581; *Hyde v. Trent and Mersey Nav. Co.*, 5 Id. 389; *Denny v. New York Cent. R. R.*, 13 Gray, 481, 74 Am. Dec. 645. And so it may occur that one party will be liable only as a warehouseman after he shall have completed all the services in the way of transportation which can be required of him, and another liable only in the same relation before the further transportation has commenced, or before he has become responsible in another and distinct relation.

In applying these principles to the facts which were developed upon the trial of the present action, there is no difficulty in determining what are the rights and obligations of the parties. From the statements in the bill of exceptions, it appears that the plaintiff's goods, contained in two boxes marked "G. C. Judson, Springfield, Mass., by railroad," were delivered at Fonda in the state of New York, to the New York Central Railroad Company for transportation. That company gave to the plaintiff upon receiving the goods a "shipping receipt," by the terms of which they agreed to transport them to their warehouse at Albany, to be there delivered to the party then entitled to receive them. The defendants' road was the connecting line over which the transportation of the goods was to be continued to the plaintiff at Springfield. But the two railroads do not unite by coming into any actual connection with each other. The former terminates at its freight-house in the city of Albany on the western side, and the latter terminates at its freight-house on the eastern side of the Hudson River. So that goods which are brought over the road of the former company, and are to be carried forward to some point or station on the

road of the latter, must be unladen from the cars in which they are brought to Albany, and carried across the river and deposited in the freight-house of the Western railroad, and there be again laden in their cars. While remaining in their warehouse, the goods may therefore be in their possession as warehousemen. Whether they are liable in that capacity, or as common carriers, must be determined upon the facts relating to each particular transaction.

It appears from the evidence produced at the trial that by the course of business between these two roads it is the practice of the Central road, upon the arrival of freight from points on the line of its road destined for points on the line of the Western Railroad, to make out bills called expense bills, containing the freight charges of the Central road upon each parcel or lot of freight, and to send the goods by carmen with the expense bills across the river to the freight-house of the Western railroad, where the goods are compared by the agents of the latter road, and if found to be correct, are checked and handed to a clerk, who enters them on the books of freight received, from which the way-bills are made out. Upon the arrival of the plaintiffs' goods at Albany, they were sent across the river by the New York Central Railroad Company in the usual manner, and were delivered at the freight-house of the defendants at the usual place of depositing such freight, and notice thereof was given to their proper servants. Upon the question whether the expense bills were delivered to any such agent or servant before the loss and destruction of the goods by the fire, which occurred while they remained in the freight house, the evidence was conflicting and contradictory. The defendants requested the court to instruct the jury, that in view of the course of business and usage between the two roads, although the goods were delivered to the proper agent of the defendants, yet if the expense bills were not also delivered before the occurrence of the fire by which they were destroyed, the goods were not in condition for immediate transportation, and the defendants were therefore liable only in their capacity as warehousemen. To this request the court declined to accede.

The general instructions which were given to the jury respecting the liability of the defendants and the capacity in which they were liable, whether as carriers or as warehousemen, were correct. But it is apparent from the uncontested evidence in the case that according to the usage and the general course of business, and from the regulations established by the two companies, until the expense bill was furnished to the defendants, the goods delivered at their freight-station were

not in condition for immediate transportation. That document was indispensably necessary to them, to enable them to undertake the transportation of the goods. It was indispensable in order to identify the package or parcel to be carried, and also to show the amount of the lien upon them in favor of the Central company for the previous transportation from Fonda to Albany, and for which, upon accepting them, the defendants, by the usage between the two companies, would become responsible; and it afforded the only means by which they could make out their own freight-bill, or know what disposition was to be made of the goods, or what was the place of destination to which they were to be carried. Until that instrument was sent to them, they could make no arrangement for the transportation of the goods; and because they were not, for want of it, ready to be immediately transported, the defendants could only suffer the boxes to remain in the freight-house for the convenience and accommodation of the owner or consignor, until he or his agents should give them the information and directions which were indispensable to enable them to take any action in reference to the goods. In the mean time, from the very nature and provisions of the arrangement adopted by the two companies, the defendants necessarily held and had possession of the goods merely as warehousemen; for they could, under such circumstances, have charge of them only in their latter capacity. If the expense bill was delivered to them simultaneously with the delivery of the goods, or if afterwards and before the occurrence of the fire by which they were destroyed it had been duly delivered to any of their agents or servants, the goods would have been in condition for immediate transportation, and their liability as carriers would thereupon have at once attached. But before that was done, their responsibility was of a different and more limited character. The instructions asked for ought, therefore, to have been given to the jury, who would thereby have been brought directly to the determination of the question in controversy between the parties, and respecting which the evidence was conflicting and contradictory. If, upon that evidence, the jury should find that the expense bill was delivered to the defendants before the fire occurred, they would have been liable as carriers, but otherwise as warehousemen only.

It is obvious that in the conduct of business of such magnitude, and in the care and transportation of the great number and variety of goods and packages which are continually passing from one railroad to another over any great line of travel and transportation, there must be some general and certain

and well-understood arrangement between the proprietors of the connecting roads, to avoid inextricable confusion, and to enable the carriers to protect both their own rights and the rights of their customers. The arrangement which these two companies made, and which was fully proved at the trial, appears to have been a reasonable and necessary provision; and therefore it was one to which all parties were bound to conform; and consequently the defendants have a right to insist that their liability shall not be extended in any particular instance beyond the obligation which such conformity imposes upon them. For these reasons, their exceptions to the ruling of the court must be sustained, and a new trial ordered.

82. TATE V. YAZOO AND MISSISSIPPI VALLEY RAILROAD CO.,

78 Miss. 842; 29 So. R. 392; 84 Am. St. R. 649. 1901.

Action against a carrier for a carload of cotton destroyed by fire. Judgment directed for defendants.

TERRAL, J. The appellee in this case recovered judgment by a peremptory instruction, and the appellants insist that a peremptory instruction should have been given in their behalf. On the 28th of September, 1897, the appellants loaded upon a car of the defendant company, at Clack's station, twenty-four bales of cotton. The loading of the car was finished after sundown, and after the local freight train of that day, which was accustomed to take loaded cars from Clack's, had passed on its return trip to Memphis, and no other local freight train, by which alone cotton was shipped from Clack's, would arrive at said station until the evening of the next succeeding day. Early on the morning of the 29th of September the carload of cotton was wholly consumed by fire, and this suit, being a consolidation of five suits, is to recover its value. Tate & Co. operated a public gin at Clack's, where the defendant company had a siding, but it had no station-house or agent at that point. Japson and Keese, who were in charge of Tate & Co.'s gin and plantation at Clack's, testified that when it was desired to ship cotton, one of them would inform the conductor of the local freight train, and the conductor would set out there an empty car for loading, and that when the car was loaded and ready for transportation, the local freight train desired to take the loaded

car would be flagged, and the conductor of it informed that the car was ready for transportation, when the conductor would sign the shipper's loading account, if found correct, and attach the car to his train, and transport it to its destination. The contention of the appellants is that they had delivered the twenty-four bales of cotton to the defendant company, and that the cotton was burned while in its custody; that the cotton was actually or constructively delivered to the railway company, and that it is chargeable for the loss. We think, however, that it is quite clear that the railway company had never come into possession of the cotton for transportation. The car, it was true, was the car of the company, and it was placed upon the company's siding at Clack's for being loaded, and the cotton was loaded into the car, but no servant of the company had any notice of the car being loaded and ready for shipment. Keesee testified that his recollection was (the trial being had some time after the loss), that, when the car was loaded, a man was left there with it, with the shipping account filled out, in order to stop the train and get the conductor's receipt for it. And it appears that the flagging of the local freight train and delivery of the shipper's loading account to the conductor was an essential feature of the shipping of cotton at Clack's. But Japson and others conclusively show that the local freight train for that day had already passed before the car was loaded, and no other train that could have been expected to take the car would come by there until after the car was burned. There was no constructive delivery of the cotton to the railroad company. Its proper servant, the conductor of the local freight train, by which it was desired to have this cotton transported, knew nothing of its being loaded into the car for shipment, and there could be no acceptance of the cotton for shipment without such knowledge, unless, indeed, there had been an agreement between the parties making the mere loading of the car an acceptance of the freight for transportation. But no such agreement was shown. On the contrary, the clear course of dealing between the parties at Clack's showed that the shipper was to flag the proper local freight train, and deliver to the conductor of the train the car to be transported, with the shipper's loading account thereof. A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. In this case, according to the course of dealing between the parties, there could have been no delivery of the cotton

to the railroad company, until it was loaded and the local freight train conductor had notice of the items of freight, its destination and of its readiness for transportation. Parties desiring to hold common carriers to a stricter responsibility than that imposed by the common law should provide therefor by contract, for, unless bound by contract, otherwise a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him, and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation, and the shipper's desire therefor: Hutchinson on Carriers, c. 4; Schouler on Bailments and Carriers, c. 3; Angell on Carriers, c. 140; 2 Kent's Commentaries, 608; Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, 303.

Affirmed.

83. MORGANTON MANUFACTURING CO. V. OHIO RIVER
AND CHARLESTON RAILWAY CO.,

121 N. C. 514; 28 S. E. R. 474; 61 Am. St. R. 679. 1897.

Action against a terminal carrier for injury to a consignment of glass. Plaintiff had judgment.

FAIRCLOTH, C. J. A box of plate glass was shipped from New York City to Marion, North Carolina. The Pennsylvania Railroad Company, the initial carrier, received and transferred the case to the Norfolk & Western Road at Hagerstown. Then the car containing the box was transferred at Roanoke to the Cape Fear & Yadkin Valley road and by them brought to the Seaboard Air Line Road at Sanford with the seal of the latter on the car at Shelby, North Carolina. At that place the agent of the defendant broke the seal and checked off the contents of the car on the waybill and examined the box and found it in apparent good order. He said in his testimony that there were no marks of rough usage on the outside of the box—that he took a copy of the waybill and delivered it to the defendant's conductor, who carried the car and copy of the waybill to Marion, and that he (the agent) marked the waybill O. K.; also that he did not examine the contents of the box, and that his company did not require him to give a receipt for freight transferred to defendant from connecting lines. The defendant's agent at Marion testified that he received the box, and that the glass was not damaged in taking it off the car, nor while it was in the depot at Marion; that ten days thereafter he and plaintiff's

agent opened the box and found the glass badly damaged. A contractor and builder examined the box, and said it must have fallen and struck something hard, causing the break in the glass.

The agent of the first carrier at New York sent a bill of lading with the package, stamped on its face "Released," and gave a receipt for the box "in apparent good order (contents and condition of contents unknown) to be transported to and delivered at the regular freight station of the company at ———, subject to all the conditions," etc., among which were these words: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route," etc. This action is against the terminal carrier.

The defendant contends that it is not liable unless it be shown that the damage occurred on its line, and that there is no evidence that that was so.

We understand "released" to mean exemption from the common-law liability as an insurer. It seems to be agreed that O. K. means all right or in good condition: *Baxter v. Ellis*, 111 N. C. 124. It must be admitted that the present system of rapid transit, consisting of through lines, connecting lines, associated lines, and the like, makes it difficult in some cases to locate the line on which the damage occurs, and it would seem practicable for the interested lines to make some arrangement for their own benefit and the public convenience by prorating the freight charges and also the damages, when they cannot be located, and thereby avoid the inconvenience of actual inspection at every transfer, which would not only be inconvenient and cause much delay but serious loss to the consignee.

This case illustrates the difficulty. The glass, being very thick, could not have been broken without a severe jar, and, looking at the evidence, it is scarcely possible to see where or how it occurred.

The case does not fall within the principle of *Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693, 25 S. E. R. 854, 56 Am. St. Rep. 682, where it was held that the associated companies were partners, and each one liable for the negligence of either of the other lines. We are not required to discuss the liability of the other lines which handled the package of glass. The first discovery of damage was when the goods were at the terminal point of the defendant's line.

A bill of lading is something more than a simple receipt. It is a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties,

and, being in writing, cannot be explained by parol evidence, and thereby change its legal import, in the absence of fraud or mistake. It also, by the terms of the writing, as in this case, excludes the common-law liability of the carrier, because it is a special contract governed by its own limitations. The bill, as a receipt, is an acknowledgment of the quantity, character, and condition of the articles delivered and received, and as such may be explained, varied, or contradicted like other receipts. This exemption from the common-law liability may be enforced, if it be reasonable and does not involve exemption from negligence: Ray's Negligence of Imposed Duties, 93-95; Pollard v. Vinton, 105 U. S. 7; Elliott on Railroads, sec. 1415.

The defendant's agent having received the box apparently in good condition and marked the bill of lading "O. K." was an adoption of the terms and conditions specified in writing by the initial carrier, and these facts raise a rebuttable presumption that the damage occurred thereafter. The defendant endeavored to meet and overcome this presumption with evidence, and went to the jury with his evidence. The court charged the jury that among connecting lines the carrier, in whose hands the property is found damaged, is presumed to have caused the damage, and that the burden is upon the defendant to rebut this presumption and satisfy the jury that the glass was not damaged in its possession. In response to the inquiry of the jury, the court charged them that, if the condition of the contents was unknown to the defendant, liability could have been guarded against by examination or stipulation, and that failure to do so was negligence. This we think was correct according to the authorities and the facts.

The instructions asked for by defendant were not suited to the facts, and ignored the presumption just pointed out, and were properly refused. It has been held that the stipulation above stated is a reasonable one and consistent with public policy: *Phifer v. Carolina Cent. R. R. Co.*, 89 N. C. 311, 45 Am. Rep. 687. It has also been held by this court that, if the contents and their condition be unknown, liability may be avoided by examination or by a stipulation, and that it is negligence in a receiving line not to observe these precautions: *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538.

Affirmed.

84. FRIEDLANDER V. TEXAS AND PACIFIC RAILWAY
CO.,

130 U. S. 416; 9 S. Ct. R. 570. 1888.

Action by plaintiffs as assignees for value of a bill of lading for the non-delivery of cotton. Defendants' agent, Easton, had colluded with one Lahnstein to issue the bill of lading without receiving any cotton for transportation. Judgment for defendants.

FULLER, C. J. The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading" cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer

a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence. *Shaw v. Railroad Co.*, 101 U. S. 557, 563; *Pollard v. Vinton*, 105 U. S. 7, 8; *Gurney v. Behrend*, 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman v. Buckingham*, 18 How. 182, 191; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason*, 2 T. R. 63; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice Miller, in *Pollard v. Vinton*, *supra*, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in *Iron Mountain Railway v. Knight*, 122 U. S. 79, 87; 7 S. Ct. R. 1132, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established

by the cases of *The Schooner Freeman v. Buckingham*, 18 How. 182, and *Pollard v. Vinton*, 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Willes, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." See also *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co. v. Charnwood Forest Railway Co.*, 18 Q. B. D. 714.

The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the

delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be affirmed.

85. AYRES V. CHICAGO AND NORTHWESTERN RAILWAY CO.,

71 Wis. 372; 37 N. W. R. 432; 5 Am. St. R. 227. 1888.

Action against defendant as a common carrier of live stock for damages due to delay in furnishing seven cars ordered for the shipment of live stock. Two cars were furnished at the required time, but the other five were not, nor was plaintiff notified that the cars could not be furnished as ordered, in consequence of which he brought sufficient live stock to the stations to load all the cars. Verdict of \$825.97 for plaintiff because of cost of care and feeding, and depreciation in value and shrinkage due to the delay.

CASSODAY, J. There is no finding of any agreement on the part of the defendant to have the cars in readiness at the stations on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said: "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defend-

ant causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the stations named, as ordered by the plaintiffs, and in the absence of any contract to do so.

In *Richardson v. Chicago etc. R'y Co.*, 61 Wis. 601, 18 Am. & Eng. R. R. Cas. 530, 21 N. W. R. 49, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock to exempt itself by express contract "from damage caused wholly or perhaps in part by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier upon mere notice to furnish cars, and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others."

In that case, there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in

writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to and did submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument.

We are therefore forced to the conclusion that, at the time the plaintiffs applied for the cars, the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire, upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in *Richardson v. Chicago etc. R'y Co.*, *supra*, and is supported by the logic of numerous cases: *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727, 8 S. Ct. R. 266; *Moulton v. St. Paul etc. R. R. Co.*, 31 Minn. 85, 16 N. W. R. 497, 12 Am. & Eng. R. R. Cas. 13; *Lindsley v. Chicago etc. R. R. Co.*, 36 Minn. 539, 32 N. W. R. 7; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 15 Am. R. 19; *Kimball v. Rutland, etc. R. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Rixford v. Smith*, 52 N. H. 355, 13 Am. R. 42; *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *South & N. A. R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. R. 578; *Baker v. L. & N. R. R. Co.*, 10 Lea, 304, 16 Am. & Eng. R. R. Cas. 149; *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209, 40 Am. R. 415; *McFadden v. M. P. R. R. Co.*, 92 Mo. 343, 4 S. W. R. 698, 3 Am. & Eng. Cyclop. Law, 1-10, and the cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry

for every person tendering goods of any description, but his obligation is to carry according to his public profession": *Johnson v. Midland R. R. Co.*, 4 Ex. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier: *Texas etc. R. R. Co. v. Nicholson*, 61 Tex. 491; *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. R. 70; *Ballentine v. N. M. R. R. Co.*, 40 Mo. 491, 93 Am. D. 315; *Guinn v. W., St. L. & P. R. R. Co.*, 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road.

It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually

beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is, whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff: *Hepler v. State*, 58 Wis. 46, 16 N. W. R. 42. But it has been held otherwise where the only proof is peculiarly within the control of the defendant: *Mecklem v. Blake*, 16 Id. 102, 82 Am. D. 707; *Beckman v. Henn*, 17 Id. 412; *Noonan v. Ilsley*, 21 Id. 144, 84 Am. D. 742; *Great Western R. R. Co. v. Bacon*, 30 Ill. 352, 88 Am. D. 199; *Brown v. Brown*, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were, at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and place named, and finds

§§ 85, 86 RIGHTS AND DUTIES OF COMMON CARRIER.

no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did, to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday: *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613; 33 Am. R. 70. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the COURT. Ordered accordingly.

86. EXPRESS CASES,

117 U. S. 1, 6 S. Ct. R. 542. 1885.

These cases were begun by the Southern Express Co. against the St. Louis, Iron Mountain & Southern Railroad Co. and the Memphis & Little Rock Railroad Co., and by the Adams Express Co. against the Missouri, Kansas & Texas Railway Co. to compel them to give them the express facilities which they had previously enjoyed by contract, and of which they had been dispossessed by notice given in accordance with the terms of the contracts. Judgment below in favor of the Express companies.

WAITE, C. J. . . . The evidence shows that the express business was first organized in the United States about the year 1839. The case of *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. 344, grew out of a loss by the burning of the steamboat *Lexington* on Long Island Sound in January, 1840, of \$18,000 in gold and silver coin, while in charge of Wm. F. Harnden, an express carrier, for transportation from New

York to Boston. In the report of this case is found a copy of one of the earliest advertisements of the express business as published in two of the Boston newspapers in July, 1839. It is as follows:

“Boston and New York Express Package Car.—Notice to Merchants, Brokers, Booksellers, and all Business Men.

“Wm. F. Harnden, having made arrangements with the New York and Boston Transportation and Stonington and Providence Railroad Companies, will run a car through from Boston to New York and vice versa, via Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes and bills, and will transact any other business that may be intrusted to him.

“Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany and Troy will be forwarded immediately on arrival in New York.

(For the remainder of this agreement see *ante* § 79.)

Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general pub-

lic; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railroad company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted.

(Omitting the constitutional and statutory provisions in certain states.)

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the express man in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their

reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late Civil War the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American two hundred roads, with a mileage of 28,000 miles, and the Southern ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all those who need their services. The good will of their business

is of great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business, they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express

companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to

decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, 4 S. Ct. R. 185, followed at this term in *Pullman Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587, 6 S. Ct. R. 194, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and,

§§ 86, 87 RIGHTS AND DUTIES OF COMMON CARRIER.

after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MR. JUSTICE MILLER filed an opinion vigorously dissenting, with which Mr. Justice Field concurred.

87. HART V. CHICAGO AND NORTHWESTERN RAILWAY CO.,

69 Iowa 485, 29 N. W. R. 597. 1886.

ON the eighteenth day of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one car-load of property, which the latter undertook to transport to the town of Miller, in Dakota territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than \$100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to, and did, ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open and the man in charge of the horses was found asleep. The trainmen and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appeals.

REED, J.—I. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's ser-

vant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant, who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property, while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. *Coggs v. Bernard*, 2 Ld. Raym., 909; *Forward v. Pittard*, 1 Durn. & E., 27; *Riley v. Horne*, 5 Bing., 217; *Thomas v. Railway Co.*, 10 Met. (Mass.) 472, 43 Am. D. 444; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. D. 311; *Moses v. Railway Co.*, 24 N. H. 71, 55 Am. D. 222; *Rixford v. Smith*, 52 N. H. 355, 13 Am. R. 42. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the

§§ 87, 88 RIGHTS AND DUTIES OF COMMON CARRIER.

exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr. §§ 19, 23.

(Omitting other questions.) Judgment reversed.

88. FORWARD V. PITTARD,

1 Term Rep. 27. 1785.

THIS was an action on the case against the defendant, as a common carrier, for not safely carrying and delivering the plaintiff's goods. The action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:

“That the defendant was a common carrier from London to Shaftesbury. That on Thursday, the 14th of October, 1784, the plaintiff delivered to him on Weyhill twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftesbury by his public road wagon, which travels from London through Andover to Shaftesbury. That, by the course of traveling, such wagon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of about 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them *without any actual negligence in the defendant*. That the fire was not occasioned by lightning.”

LORD MANSFIELD. After stating the case. The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back that there are events for which the carrier is liable *independent of his contract*. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now,

what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier unless he shows it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.

89. RAILROAD CO. V. REEVES,

10 Wallace (U. S.) 176. 1869.

Reeves sued the Memphis and Charleston Railroad Company as a common carrier for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco came by rail from Salisbury, North Carolina, to Chattanooga, Tennessee, reaching the latter place on the *5th of March*, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and reloaded into two of its cars, about five o'clock in the afternoon.

One Price, who as agent of Reeves was attending and looking after the tobacco along the route, testified (though his testimony on this point was contradicted) that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco should go forward at six o'clock *that evening*; and shortly before that time informed him that the bills *had* come over, and assured him that the tobacco would go off at that hour. Had it gone off the evening of the 5th it would not have

been damaged. An unprecedented flood submerged the track and injured the tobacco.

Verdict for plaintiff.

MILLER, J. (Omitting a preliminary point). As to the charge given by the court, the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning-point of the case.

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words:

“When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case.”

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one

of the most sudden, violent, and extraordinary floods ever known in that part of the country. The tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In *Morrison v. Davis & Co.*, 20 Pa. St. 171, 57 Am. D. 695, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In *Denny v. New York Central R. R. Co.*, 13 Gray 481, 74 Am. D. 645, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that

§§ 89, 90 RIGHTS AND DUTIES OF COMMON CARRIER.

the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison v. Davis & Co.*

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.

90. PINGREE V. DETROIT, LANSING AND NORTHERN RAILROAD CO.,

66 Mich. 143; 33 N. W. R. 298; 11 Am. St. R. 479. 1887.

Case, against a common carrier for failure to deliver a consignment of boots and shoes to plaintiffs.

CAMPBELL, C. J. This case presents a single question on facts found.

Plaintiffs had a chattel mortgage against Francis M. and Myron C. Butts, which was made on August 4, 1886. The next day, the two Butts made a transfer of the property to one Steere. Plaintiffs replevied from Steere, and on August 12 shipped the goods by defendant's railroad from Edmore, directed to Detroit, taking the usual bill of lading. On the same day, the goods were taken by the sheriff at Stanton, on an attachment against said F. M. and M. C. Butts, in favor of John W. Fuller and others. Defendant notified plaintiffs of this seizure. Plaintiffs now sue defendant for not delivering the goods at Detroit. The question is, whether the seizure by the sheriff exonerated defendant from such delivery. The court below held that it did.

There seems to be a little apparent conflict between the cases

on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property from a person not authorized to direct its shipment, he has been declared by the supreme court of this state to have no lien for his services, and no right to retain the property: *Fitch v. Newberry*, 1 Doug. 1; 40 Am. Dec. 33. There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending, unless the consignor gives it to him. In the present case, the attachment was against plaintiffs' mortgagors, and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure without incurring the risk of serious civil, and perhaps criminal, liability; and if plaintiffs' claim is correct, this must have been done at defendant's own risk and expense.

This precise question was decided in favor of the carrier in *Stiles v. Davis*, 1 Black, 101, upon the ground that defendant was not required to resist the sheriff, and could not properly do so. This rule has been adhered to by the United States supreme court, and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of goods, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper.

Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority.

I think the judgment should be affirmed.

91. STILES V. DAVIS,

1 Black (U. S.) 101. 1861.

TROVER against defendants, common carriers, for goods of the value of \$4,000. Verdict for plaintiff for \$3,041.14.

NELSON, J. The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm, at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnished, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by

the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attach't, 2d edition.

This precise question was determined in Verrall v. Robinson (Turwhitt's Exch. R., 1069; 4 Dowling, 242, S. C.). There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Bank's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed; Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification, if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed, and *venire de novo*, etc.

92. BENNETT V. AMERICAN EXPRESS CO.,

83 Me. 236; 22 Atl. R. 159; 23 Am. St. R. 774. 1891.

FOSTER, J. It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer which were

legally killed under the laws of this state; that the same were closely boxed, in good condition for shipment, and delivered by the plaintiff onto the platform of the Maine Central Railroad Company, at Newport station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car, on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game warden, and by him removed from the defendants' car, without any search warrant or other legal process, and without objections from the defendant company or their agents, and have never since been delivered, either to the consignees or the express company.

Upon the facts thus stated, the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is therefore upon the defendants to show facts exempting them from liability: *Little v. Boston and Maine R. R. Co.*, 66 Me. 241.

The property of the plaintiff while in the hands of the defendants as common carriers, *in transitu*, was seized by an officer, without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was, therefore, a mere trespasser, and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody: *Edwards v. White Line Transit Co.*, 104 Mass. 163, 6 Am. Rep. 213. As against the plaintiff, the seizure was of no more validity than a trespass of an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery, or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown, and, upon grounds of public policy, is liable for all losses resulting from accident, trespass, theft, or any kind of unlawful dispossession of the property intrusted to him to carry,—excepting only such as arise by the act of God or public enemies: *Adams v. Scott*, 104 Mass. 166; *Kiff v. Old Colony and Newport R'y Co.*, 117 Mass. 593, 19 Am. Rep. 429; *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 462, 92 Am. Dec. 606.

In the case of *Edwards v. White Line Transit Co.*, 104 Mass.

163, 6 Am. Rep. 213, it was held that while the carrier was not liable in trover for conversion of the property, he was, nevertheless, liable on his contract or obligation as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," say the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

(After deciding that the game laws would not justify defendants in refusing to ship the property.)

The box was delivered to and received by the company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendants, that their agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the company's responsibility by special contract, or such knowledge brought home to this plaintiff, and assented to by him, as would be necessary to limit such responsibility: *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 462, 92 Am. Dec. 606. "A common carrier may limit his responsibility for property intrusted to him," says Bigelow, C. J., in *Buckland v. Adams Exp. Co.*, 97 Mass. 125, 93 Am. Dec. 68, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value, and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff; it was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this state. Their

§§ 92, 93 RIGHTS AND DUTIES OF COMMON CARRIER.

liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this state, but to a point outside of its limits, in another state. It had lawfully commenced to move as an article of commerce from one state to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the state. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States. The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold, or exchanged, is, without doubt, a constituent of commerce itself, and is protected by and subject only to the regulation of Congress: *The Daniel Ball*, 10 Wall. 557, 565; *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, 485, 8 S. Ct. R. 689; *County of Mobile v. Kimball*, 102 U. S. 691; *Welton v. Missouri*, 91 U. S. 275; *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. R. 475; *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. R. 681.

Defendants to be defaulted; damages to be assessed at *nisi prius*.

93. ORANGE CO. BANK V. BROWN,

9 Wend. (N. Y.) 85, 24 Am. D. 129. 1832.

CASE, against a carrier for negligence resulting in the loss of a trunk containing \$11,250. The plaintiff bank had requested one Phillips to bring to it from the Bank of America seven sealed packages of bank notes of the above value, advising him to put them in charge of the captain of defendant's steamboat. He informed the captain or clerk that he had a trunk "of importance" which he wished to put in the office. At their suggestion he put the trunk behind the door till they should get under way. He then went ashore for a few minutes and on returning found the trunk was gone.

By Court, NELSON, J. This case is peculiar in many of its features, and must be determined by a recurrence to some of the general and fundamental principles which govern actions of this kind. The rule of the common law in relation to common carriers has been frequently pronounced a rigorous one, and its vindication by Lord Holt affords abundant evidence, if

any were wanting, of the truth of the observation. He says, in *Lane v. Cotton*, 1 Vin. Abr. 219, though one may think it a hard case that a poor carrier that is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party, and the law will not expose him to so great a temptation. This reason, which I believe is the only one that has ever been given for the origin of the rule, and which probably had much foundation in fact in the early and rude age in which it must have been established, it is obvious, at this day, is nearly as applicable to every person intrusted with the property of another, as it is to the common carrier. In proportion, however, to the rigor of the liability, was exacted the compensation for it and the means of enforcing payment, which affords a sort of equivalent for the harshness of the rule. Accordingly we find it frequently laid down in actions of this kind, as a fundamental proposition, that the common carrier is liable in respect to his reward, and that the compensation should be in proportion to the risk. So strictly was this rule adhered to that it was repeatedly decided by Lord Holt that the hackney coachman was not liable for the traveling trunk of the passenger which was lost, unless a distinct price had been paid for the trunk as well as for the person; and that where it was the custom of the stage coach for passengers to pay for baggage above a certain weight, the coachman was responsible only for the loss of goods beyond such weight: 1 Vin. Abr. 220, and cases there cited. So in the analogous case of the innkeeper, if a guest stops at an inn, and departs for a few days, leaving his goods; if they are stolen during his absence, the landlord is not liable as innkeeper, for at the time of the loss the owner was not his guest, and he had no benefit from the keeping of the goods: Cro. Jac. 188; 1 Vin. Abr. 225. It has since been determined that the stage coachman is responsible for the baggage of the passenger, though no distinct price was paid for it, upon the ground, however, still consistent with the principle of the above cases, to wit, that the reward for carrying the same was included in the fare for the passenger: 1 Wheat. Selw. 301, n. 1.

Now, upon the ground that the defendants in this case have received no compensation or reward from the plaintiffs or any other person for the transportation or risk of the money in question, and that they were deprived of such reward by the unfair dealing of the agent of the plaintiffs with the defend-

ants, I am of opinion the plaintiffs cannot recover, and that they were properly nonsuited upon the trial. As a general rule, where there has been no qualified acceptance of goods by special agreement, or where an agreement cannot be inferred from notice, the carrier is bound to make inquiry as to the value of the box or article received, and the owner must answer truly at his peril; and if such inquiries are not made, and it is received at such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value. If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium. The carrier in such case is not bound to make the inquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of the delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice: 1 Wheat. Selw. 305, 306, 308, and notes; 6 Com. L. R. 333 (1st Am. Ed.); 4 Burr. 2298; 5 Com. L. R. 476; 8 Pick. 182; 11 Com. L. R. 243.

In this case no notice has been given by the defendants limiting their responsibility, and they are no doubt liable to the full value of the baggage of the passenger lost, or of the goods lost, which they have received without any special agreement qualifying the risk for transportation. The defendants cannot succeed upon this ground. But in the absence of notice, if any means are used to conceal the value of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness and its consequence to the defendants, upon the principles of common justice as well as those peculiar to this action, will exempt them from the responsibility; for such a result is alike due to the defendants, who have received no reward for the risk, and to the party who has been the cause of it by means of disingenuous and unfair dealing. Thus, where the plaintiff delivered to the carrier a box, telling him there was a book and tobacco in it, when it contained one hundred pounds, and it was lost, he should not recover. It is true that in such a case a party did recover, though Rolle, C. J., considered it a cheat; but it is clear that at this day he could not recover: 4 Burr. 2301.

So, where a box, in which there was a large sum of money,

was brought to a carrier, who inquired its contents, and was answered it was filled with silk, upon which it was taken and lost, it was held the owner could not recover: 4 Burr. 2301. So where a bag sealed was delivered to a carrier, and was said to contain two hundred pounds, and a receipt was given for the same, when, in fact, it contained four hundred pounds, and it was lost, the carrier was held answerable only for the two hundred pounds, as the reward extended no farther: *Id.*; Selw. 305 (n.) These cases all proceed upon the ground that the carrier is deprived of his reward for the extra value of the article, and consequent extra risk incurred, by means of the unfair if not fraudulent conduct of the owner, and therefore the rigor of the common law rule is not applied to him, and he is only held responsible for the loss in case of gross negligence. If the defendants are to be made responsible to the plaintiffs through the medium and acts of their agent, who was employed to carry the money from New York to the bank, the plaintiffs also must be held responsible to the defendant for his conduct; the obligation must be reciprocal. Instead of committing the several packages of money to the captain, which of themselves generally indicate their value, and in this case would have done so, as the figures (by which I understand the quantity of money in each package) could be seen upon them, and thereby enable the captain to exact a reasonable compensation for the risk, and apprise him of the necessity of greater care and caution in the safe conveyance of the money, which he naturally would bestow in proportion to the value, the agent of the plaintiffs put them into his trunk, and committed it to the captain as his baggage, affording no other indication of the value of its contents than that it was a trunk of importance. This was enough to attract the attention of the felon who might be standing by to its contents, but certainly was not calculated to afford information to the captain of the extraordinary character and value of those contents. The captain might understand he had a costly wardrobe and other necessities and conveniences for traveling of great value, but not that the trunk contained eleven thousand dollars in bank bills, which the traveler was carrying for hire or friendship, and not as traveling expenses.

It may be difficult to define with technical precision what may legitimately be included in the term baggage, as used in connection with traveling in public conveyances; but it may be safely asserted that money, except what may be carried for the expenses of traveling, is not thus included, and especially a sum like the present, which was taken for the mere purpose of transportation. We have already seen that formerly so strict was

the rule that the carrier was liable only in respect to the reward adhered to, that he was not held liable for the loss of the baggage of the passenger unless a distinct price was paid for it. The law is now very properly altered, as a reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but courts ought not to permit this gratuity or custom to be abused, and under pretense of baggage to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards. If the amount of money in the trunk in this case is not fairly included under the term baggage, as used in the connection we here find it (and I cannot think it is), then the conduct of the agent was a virtual concealment of that sum; his representation of his trunk and the contents as baggage, was not a fair one; and was calculated to deceive the captain; and it would be a violation of first principles to permit the plaintiffs to recover. The case of *Miles v. Cattle et al.*, 19 Com. L. R. 219, in some respects resembles this case. The plaintiff was going to L., and took a seat in a public conveyance. He had with him a bag labeled "T. Miles, traveler," containing clothes worth about fifteen pounds. Before he started, G. delivered him a parcel containing a fifty-pound bank note, addressed to an attorney in L., which the plaintiff was desired to book at the defendants' office, and to be forwarded by the defendants to L. The plaintiff, instead of doing so, put the parcel in his own bag, intending to convey it to L. himself. If the parcel had been sent by the defendants, it would have cost four shillings and six pence. The bag and contents were lost. The verdict was found for the fifteen pounds, with leave to apply to increase it, on the facts in the case, by adding the fifty pounds. The court denied the application, principally upon the ground that the plaintiff had no interest in the fifty pounds. But it was conceded by the court that the owner could not recover on the facts. Tindale, J., says, in violation of his trust the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag; thereby depriving the owner of any remedy he might have had against the defendants, and the defendants of the sum they would otherwise have earned for the carriage of the parcel. In this case the president of the bank directed Phillips to commit the packages directed to the captain, and had he followed such directions, the captain would have been enabled to charge a reward for the carriage of the same, and the captain, or the defendants, would have been responsible for its safety. His omission to follow the directions was a viola-

tion of his trust, for which the defendants are not accountable.

It was decided in *Sewall v. Allen et al.*, in the court of errors, 6 Wend. 335, that the Dutchess and Orange Steamboat Company, and the members thereof, were not liable for the loss of packages of bank bills intrusted to the captain of the boat, on the ground that the carriage of bank bills was not within the ordinary business of the company, and so far as the usage extended, it was a personal trust committed to the captain, who alone received the compensation, or in other words, the company were neither by their charter or usage under it, common carriers of bank bills. From the facts appearing in that case, I presume the principle here decided by the highest judicial tribunal in the state, would be equally applicable to this company, though from the direction the cause took upon the trial, facts sufficient do not appear to raise the question. If so, it seems to me impossible to maintain the proposition that the defendants would be holden responsible for the loss of an article in the trunk of a passenger, which in no sense of the term can be considered a part of the baggage of the passenger, and for the transportation of which no compensation is received by the company, when confessedly they would not be accountable for the same article, if it had been committed directly to the care of the captain, and a reasonable reward paid him for transportation. If it is said the difference between the cases consists in this, that in the one case it is a part of the baggage of the passenger, the carrying of which is within the ordinary business of the company, and for which they receive the reward, and in the other, it is a private transaction between the owner and the captain; the answer I think is, that putting the article in the trunk does not make it baggage. If it is included within that term, it is as much baggage when distinctly committed to the care of the captain as when in the trunk; the place in which it is cannot, in this instance, at least, vary the character of the article or the transaction; the object is the transportation of the money, without reference to a connection with the person of the passenger.

Having come to the conclusion upon what I view as the merits and principle of the case, that the plaintiffs cannot recover, it is unimportant to examine any other question discussed upon the argument.

Motion for new trial denied.

94. EVANS V. FITCHBURG RAILROAD CO.,

111 Mass. 142; 15 Am. R. 19. 1872.

Tort to recover for injuries to plaintiff's horse. He had delivered two horses to defendant, and tied them in the car. He offered to prove that one had been injured by kicks from the other, and that both had previously been kind. The nature of the charge and refusal to charge by the judge below are sufficiently indicated in the opinion. Judgment for plaintiff.

AMES, J. According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well-known exception of the act of God and of public enemies) the goods entrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles; the fermentation, evaporation or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods; are matters to which the implied obligation of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492 a, 576. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals, from the moment they received them, until the carriages in which they were conveyed were unloaded. *Moffat v. Great Western Railway Co.*, 15 Law T. (N. S.) 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well-

known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. *Clarke v. Rochester & Syracuse Railroad Co.*, 14 N. Y. 570, 67 Am. Dec. 205. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partition between them, and by kicking each other some of them are killed, the carrier will not be held responsible. *Laurence v. Aberdeen*, 5 B. & Ald. 107; *Story on Bailments*, § 576; *Angell on Carriers*, 214 a. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of the injury is one of fact for the jury. *Hall v. Renfro*, 3 Metc. (Ky.) 51. And in a New York case, *Conger v. Hudson River Railroad Co.*, 6 Duer, 375, Mr. Justice WOODRUFF says, in behalf of the court: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us, therefore, that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precautions to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendants were entitled to a verdict. That is to say, they might be held to great vigilance, foresight and care; but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plaintiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to

§§ 94, 95 RIGHTS AND DUTIES OF COMMON CARRIER.

the instruction that if the injuries were caused by the fault or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. *Smith v. New Haven & Northampton Railroad Co.*, 12 Allen, 531. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. *Kendall v. London & Southwestern Railroad Co.*, L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

It appears to us also that the instruction actually given was not a full equivalent for that which was requested and which, as we have seen, should have been given. It was not necessary to the defense to show that the injury was caused in "an outburst of viciousness." The proposition should have been stated much more generally, and the jury should have been told that if from fright, bad temper, viciousness, or any other cause without fault on the part of the defendants, the horses became refractory and unruly, and the kicking and injury were occasioned in that manner, it was an unavoidable accident, for which the defendants were not liable.

Exceptions sustained.

95. KANSAS PACIFIC RAILWAY CO. V. NICHOLS,

9 Kan. 235; 12 Am. R. 494. 1872.

Action for damages for cattle lost through negligence of the carrier. Judgment for plaintiff.

VALENTINE, J. (After deciding an unimportant point of practice.) The main question in this case is, whether the railway company, when it took the cattle of the plaintiff below for the purpose of transporting them over its road, assumed the responsibilities of a common carrier or not. We think it did. This question has already been decided in this court in the case of *The Kansas P. Railway Co. v. Reynolds*, 8 Kan. 623. In the case of *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt.

247, 62 Am. D. 567, *et seq.*, the court decided that "a railway company that transport cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment." See also *Welsh v. Pittsburg, Ft. Wayne & C. R. R. Co.*, 10 Ohio St. 65, 75 Am. D. 490. In the case of the *Great Western Railway Co. v. Hawkins*, 18 Mich. 427, 433, the supreme court of Michigan use the following language: "The company in this case must be regarded as common carriers, and liable as such, except so far as that liability was qualified by the special contract." The special contract just mentioned was a contract to transport nineteen horses from Paris, Canada, to Detroit, Michigan, and there is nothing in the contract or in the report of the case that tends to show that the company held themselves out as common carriers of live stock, or that they anywhere agreed or admitted that they were such carriers, and they carried these horses under a *special* contract. See also the authorities cited in the brief of defendants in error, and 2 Redf. on Railways (4th ed.), 144, note 2, and cases there cited; *Wilson v. Hamilton*, 4 Ohio St. 738; *Sager v. Portsmouth R. R. Co.*, 31 Me. 228, 50 Am. D. 659; *Clarke v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570, 67 Am. D. 205; *North Mo. R. R. Co. v. Akers*, 4 Kan. 453, 96 Am. D. 183; *Keeney v. The Grand Trunk Railway Co.*, 59 Barb. 104; *Welsh v. Pittsburgh, Ft. Wayne & C. R. R. Co.*, 10 Ohio St. 65, 75 Am. D. 490. It is claimed that a different doctrine has recently been held in Michigan. *Mich. So. & North Ind. R. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. R. 466. This is certainly true with respect to the railroad then under consideration by the court; but whether it is true with regard to all railroads in the state of Michigan is not so certain. See pages 189, 198 and 199 of the opinion, and the comments of the court on the provisions of the charter of the Michigan Southern Railroad Co., and the act consolidating it with the Northern Indiana Railroad Company. But if this decision does apply to all the railroads of Michigan as well as to the Michigan Southern & Northern Indiana Railroad Company, under its peculiar charter, does it in any manner indicate what the law is in Kansas? We think not, or but very little at most. In Michigan, since April, 1870, railroads have not been public purposes, or public uses, in the sense that they are such in the other states of the Union. In that state they are purely and strictly private purposes or uses. *People v. Salem*, 20 Mich.

452; 4 Am. Rep. 400. The supreme court of that state say, that, "they (railroad companies) are public agents in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense." "Our policy in that respect," say the court, "has changed; railroads are no longer public works, but are private property." Railroads are private, according to that decision, in the same sense that the different kinds of business of hackmen, draymen, proprietors of stage coaches, merchants, newspaper proprietors, physicians, manufacturers, mechanics, hotel-keepers, millers, etc., are private. Railroads in Michigan seem from that decision to be such private corporations as are described in the case of *Leavenworth Co. v. Miller*, 7 Kan. 534, 535. If they are such private corporations as there described, of course they have a right to be common carriers of just such property as they choose, no more and no less. This is not so in Kansas. The railroads of Kansas are organized upon a different basis. In Kansas they are endowed with a kind of *quasi* public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their benefit, and they are so far public that other public aid may be extended to them. It is believed that no railroad has yet been built in Kansas that has not been aided both by the exercise of the power of eminent domain, and by other public aid, such as lands and county or municipal bonds. Railroads are public purposes in no sense except in the sense of being common carriers of freight and passengers. It is true that there are incidental public benefits arising from the creation and operation of railroads, such as the increase in the value of property along their routes, the increase of the public revenues, etc., but these are only incidental benefits, and are not at all what make railroads public purposes. And this public character of railroads is stamped upon them at their very creation. It is stamped upon them by the sovereign power where it authorizes their coming into existence; for otherwise they could receive no public aid until the roads should be constructed and in operation, and until the roads should become public purposes by virtue of becoming common carriers of freight or passengers. And if they were created absolutely private corporations they could become common carriers only by holding themselves out as such, and by actually carrying freight or passengers. We suppose it will not be contended that any kind of public aid could be extended to a purely private corporation. If a railroad company is created as a private carrier, and not as a public or common carrier, we suppose that no one will contend that the sovereign power of eminent domain could be exercised

for its benefit in its construction, or that any public aid of any kind whatever could be extended to it. That railroads are *created* common carriers of some kind, we believe, is the universal doctrine of all the courts. The main question is always, whether they are common carriers of the particular thing then under consideration? The question in this case is, whether they are common carriers of cattle? So far as our statutes are concerned no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares and merchandise, or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of all kinds of property which the wants or needs of the public require to be carried, and which can be carried by the railroads; and particularly we would infer that railroads were created for the purpose of being common carriers of cattle. As Kansas, and all the surrounding states and territories, with their boundless prairies and nutritious grasses, are destined to be great stock-growing countries, it can scarcely be supposed that the legislature, in providing common carriers for the property of the public, should have omitted to provide for one of the most important kinds of property, a vast source of unbounded wealth. We have no navigable streams within the boundaries of Kansas upon which to transport cattle, and hence they must be transported by railroad, if transported by any means except by driving them on foot.

It is claimed, however, that "the transportation of cattle and live stock by common carriers *by land* was unknown to the common law." Suppose it was; what does that prove? The transportation of thousands of other kinds of property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers, and by railroads every day. We get our common law from England. It was brought over by our ancestors at the earliest settlement of this country. It dates back to the fourth year of the reign of James the First, or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of the laws of England, as they then existed, now constitute our common law. It is so fixed by statute in this state (Comp. Laws, 678; Gen. Stat. 1127, § 3), and is generally so fixed by statute or by judicial decisions in the other states. The reason why cattle and live stock were not transported *by land* by common carriers at common law, was because no common carrier, at the

time our common law was formed, had any convenient means for such transportation. Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed, are the following: Reapers, mowers, wheat drills, corn planters, cultivators, threshing machines, corn shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam engines, sewing machines, washing machines, pianos, reed organs, fire and burglar-proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried. He might have been a private or special carrier of goods, wares and merchandise, or of any other kind of property, or he might have been a public or common carrier of cattle, live stock or any other kind of property, just as he chose. All personal property was subject to be carried by a common carrier, and no personal property was exempt. Whether a person was a common carrier depended wholly upon whether he held himself out to the world as such, and not upon the kind of property that he carried. A common carrier was such as undertook, "generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Kent's Com. 598. And he could hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it to the world by the issuing of cards, circulars, advertisements, etc., or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railroads hold themselves out as common carriers by an act irrevocable on their part in their very creation and organization. The very nature of their business is such that by engaging in it, or offering to engage in it, they hold themselves out as common carriers. But let us return to the point more especially under consideration. At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses. *Tunnel v. Pettijohn*, 2 Harrington (Del.), 48. And it seems to us clear beyond all doubt, that if

any person had in England, prior to the year 1607, held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be a common carrier of all kinds, or any kind, and of just such kinds of personal property as he chose, no more, no less. Of course, it is well known that at the time when our common law had its origin, that is, prior to the year 1607, railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules, so far as applicable, which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for if such were the case they would be carriers of but very few of the innumerable articles that are now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision, then, upon this question is, that whenever a railroad company receive cattle or live stock to be transported over their road from one place to another, such company assume all the responsibilities of a common carrier, except so far as such responsibilities may be modified by special contract.

(The court then considered an instruction as to the damages, and reversed the judgment for error therein.)

96. In *Michigan Southern and Northern Indiana Railroad Co. v. McDonough*, 21 Mich. 165, 4 Am. R. 466 (1870), it was said by Christiancy, J., in delivering the opinion of the court:

“As the plaintiffs did not seek to prove an express contract in support of their declaration, it devolved upon them to prove the delivery of the property to the company and their acceptance of it, under circumstances from which the law implies the contract declared upon; and this could only be done by showing that the company received the property as common carriers, that is to say, under circumstances which made it their duty to take care of the property in its transportation and delivery, and to protect it from all injury and loss not occasioned by the act of God or of the public enemy—or at least, from all loss or injury which, in this mode of transporting this kind of property, might be avoided by human agency. It is unnecessary to discuss the question of proof upon any other feature of the contract alleged, since, if proved in all other respects, but not in this, the contract alleged, being an entire thing, is not proved.

For the purpose of this case it may be assumed that this company, by their charter and act of consolidation, are required to take upon themselves the business of common carriers, and to transport, as such, all such property tendered to them for that purpose as was usually transported by railroads, as common carriers, at the date of the charter of the Michigan Southern Railroad Company in 1846, and any other kind of property which, in the progress of invention and business, might be tendered for such carriage, which should not, from its nature, impose risks of a different character, or require an essentially different mode of managing their road, or the incurring of extra expenses on *account of the different character of such new kinds of property*.

But the transportation of cattle and live stock by common carriers by land was unknown to the common law, when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks and of quite a different kind, from those which are incident to the transportation of live stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of

the cars, in their frenzy injure each other by trampling, plunging, goring or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and unless helped up, must soon die. Hogs also swelter and perish. See per PARKE, B., in *Carr v. Lancashire & York Railway Co.*, 7 Exch. 712, 713; DENIO, J., in *Clarke v. Rochester & S. Railway Co.*, 14 N. Y. 573, 67 Am. D. 205. It is a mode of transportation which, but for its necessity, would be gross cruelty and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not think this kind of property falls within the reasons upon which the common law liability of common carriers was fixed. . . .

Unless, therefore, there be something in the defendant's charter, or the act of consolidation, or some other statute applicable to the case—a question I shall hereafter consider—the company were not bound to receive or transport cattle or hogs, as common carriers, but they might legally refuse to carry them in that or any other capacity.”

97. HINKLE V. SOUTHERN RAILWAY CO.,

126 N. C. 932; 36 S. E. R. 348; 78 Am. St. R. 685. 1900.

Action to recover damages due to delay in shipment of a car-load of cattle. The cattle were injured, had to be fed *en route* and missed the Saturday market. The contract on the bill of lading provided against liability for all injuries not caused by the fraud or gross negligence of the railroad company, and required the shipper to give written notice of any loss. Judgment for plaintiff in the sum of \$225.00.

DOUGLAS, J. This case was submitted to us on printed briefs for the plaintiffs, but was argued in behalf of the defendant both orally and by brief. It is perhaps proper to say that almost the entire brief of the defendant was devoted to proving a proposition that we have no disposition to deny, that is, that a common carrier can, by special contract, reasonably limit its common-law liability. But we cannot admit the assumed corollary that thereby it ceases to be a common carrier, or *ipso facto*

reverses the legal burden of proof. It is well established that where the negligence of the defendant is the primary cause of action, it must be alleged and proved by the plaintiff; but here, it is merely incidental to the cause of action; in fact, it arises as a matter of defense. We must not lose sight of the real cause of action, which is the injury resulting from the failure of the defendant to seasonably transport and safely deliver live stock received by it as a common carrier. The plaintiff's case is fully made out when he has shown that the cattle were received by the carrier, and not seasonably and safely delivered—that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay. The burden is then upon the defendant, and if it wishes to escape any part of its common-law liability by showing a special contract, it must affirmatively prove such contract, and bring the injury clearly within the terms of it exemptions. These principles have been so recently and so fully discussed by this court in *Mitchell v. Carolina Cent. R. R. Co.*, 124 N. C. 236, 32 S. E. R. 671, that any further elaboration seems needless, at least for the present. The essential principle is tersely and strongly stated by Chief Justice Faircloth in *Morganton Mfg. Co. v. Ohio River, etc., Ry. Co.*, 121 N. C. 514, 28 S. E. R. 474, 61 Am. St. R. 679, where, speaking for a unanimous court, he says: “Among connecting lines of common carriers, that one in whose hands goods are found damaged, is presumed to have caused the damage, and the burden is upon it to rebut the presumption.”

The rule is well stated in *Greenleaf on Evidence*, fourteenth edition, section 219, in the following language: “And if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of loss was within the terms of the exception but also that there was on his part no negligence or want of due care.”

That this rule, which at first was seriously questioned, is receiving almost general acceptance, would appear from the recent work of Elliot on Railroads, where the authors say in section 1548, on page 2403: “There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule where the owner or his agent does not go with the stock is, that when the animals are shown to have been delivered to the carrier in good condition and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence.” This rule, which is the natural result of the *prima facie* liability of the common carrier, is further strengthened by the universal acceptance of the principal that where a particular

fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof: 5 Am. & Eng. Ency. of Law, 2d ed., 41; Best on Evidence, sec. 274; 1 Greenleaf on Evidence, sec. 79; Starkie on Evidence, sec. 589; Rice on Evidence, sec. 77; Selma, etc. R. R. Co. v. United States, 139 U. S. 560, 567, 11 S. Ct. R. 638; State v. McDuffie, 107 N. C. 885, 888, 12 S. E. R. 83; Govan v. Cushing, 111 N. C. 458, 461, 16 S. E. R. 619; Mitchell v. Carolina Cent. R. R. Co., 124 N. C. 236, 32 S. E. R. 671. Some of the earlier cases appear to take the view that a common carrier ceases to be such when it makes a special contract and becomes a private carrier for hire. Whatever foundation may have existed for such an idea in the earlier days of the law, when common carriers were private individuals and carried their shipments in wagons or boats on the ordinary public highway, without receiving or asking any special privileges, has long since disappeared. A railroad company is at least a quasi public corporation, exercising one of the highest prerogatives of the sovereign—that of eminent domain. It is purely a creature of the law, and has no existence outside of its public capacity. It is a common carrier by virtue of its charter, and not by any supposed usage or contract with the shipper. Its character as such is fixed by its contract with the state, and cannot be waived either by the corporation or the shipper. It may limit its liability to a certain extent by special contract, but cannot change its character. All such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable: Any doubt or ambiguity therein is to be resolved in favor of the shipper, and it has further been held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable: *Campania etc. La Flecha v. Brauer*, 168 U. S. 104, 118, 18 S. Ct. R. 12; 4 Elliott on Railroads, sec. 1424; *Cox v. Central etc. R. R. Co.*, 170 Mass. 129, 49 N. E. R. 97, 9 Am. & Eng. R. R. Cases, N. S. 591, 600; *Texas etc. Ry. Co. v. Reeves*, 15 Tex. Civ. App. 157, 39 S. W. R. 135, 8 Am. & Eng. R. R. Cases, N. S. 429; 5 Am. & Eng. Ency. of Law, 2d ed., 326. Stipulations in a bill of lading are similar in their nature to conditions in a policy of insurance. It is well settled by the highest authority that if a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and against the construction which would limit the liability of the insurer: *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 S. Ct.

R. 379; *London Assur. Assn. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 17 S. Ct. R. 785.

In the case at bar it does not appear necessary for the plaintiff to resort to the burden of proof, as the unreasonable detention is in itself evidence of negligence. It appears from the evidence that the cattle were four days and three nights, that is, eighty-four hours, in reaching their destination, a distance of four hundred miles. At the present day the transportation of live stock over a great trunk line of railway at an average rate of less than five miles an hour cannot be considered reasonable diligence, in the total absence of explanation.

The only remaining question is whether the failure of the plaintiff to give formal written notice of his loss or intention to demand compensation is an absolute bar to his recovery, if otherwise entitled. We think not. The object of such a stipulation is not to relieve the carrier from its just liability, for such a purpose would be clearly unlawful, but simply to give it such notice as will enable it by proper investigation to protect itself against unjust claims. It is not denied that the plaintiff signed the receipt for the cattle under protest. These words written upon the receipt would be ample notice to the defendant that the plaintiff intended to enforce his rights. The meaning of those words is too well known in the business world to be capable of misconstruction. In the present instance they clearly meant that the plaintiff objected to receiving the cattle in their damaged condition, but did so under compulsion of circumstances to prevent still further loss, but at the same time retaining all his rights of action against the defendant. If the defendant's agent had desired any more specific notice or information, he might have asked for it after having been put upon notice, but this he did not see fit to do. Even if the protest had been merely verbal and not in writing, the stipulation might well have been deemed to have been waived under the circumstances. It appears from the uncontradicted testimony that the plaintiff suffered the injury and gave actual notice to the defendant of his claim for damages. We do not see why he cannot recover. Any other construction would convert what, properly construed, is a reasonable stipulation for the proper protection of the carrier into an instrument of fraud and a shield of wrong. This is so clearly explained by Justice Furches, speaking for the court, in *Wood v. Southern Ry. Co.*, 118 N. C. 1056, 1063, 24 S. E. R. 704, as to require no further comment. Judgment of the court below is affirmed.

98. BENNETT V. BYRAM & CO.,

38 Miss. 17; 75 Am. D. 90. 1859.

By Court, HARRIS, J. The defendants in error brought their action in the circuit court against the plaintiff in error, to recover damages against him as a common carrier by steamboat, for the non-delivery of goods according to contract.

The defendant filed his answer, a general denial of the statement of the cause of action in the complaint; upon which issue was joined, and the jury found a verdict for plaintiff.

It is assigned for error that the jury found contrary to law and evidence; that the court erred in giving the charges asked by plaintiff below, and in refusing charges asked by the defendant below; and lastly, that the court erred in refusing to grant a new trial.

It appears by the record that on the fourth day of June, 1855, the plaintiff in error, as master of the Eliza No. 2, a steamboat navigating the Tombigbee river between Mobile and Aberdeen, by bill of lading of that date, contracted to deliver certain goods as a carrier to the defendants in error.

The boat proceeded on her way as far as Gainesville, and was unable to proceed farther on account of the low stage of water. The goods were stored in the warehouse of McMahon in June, 1855; the water remaining too low for steamboat navigation for several months thereafter.

On the twenty-first of August, 1855, defendants in error sent an order to McMahon for all the goods except the iron, and received and hauled them to Aberdeen. And afterwards, in January, 1856, the iron was shipped to plaintiffs by the steamboat Champion. In this action, it is sought to recover all the expenses which defendants in error incurred after receiving the goods at Gainesville, and indeed after they were left there by the plaintiff in error, as well as a small amount of damage sustained by the rusting of the iron. It is not claimed that any other damage was suffered.

There is no proof of damage by negligence or other improper conduct on the part of plaintiff in error, unless his failure to reach Aberdeen with the goods intrusted to his care is to be so regarded. We lay out of view all that is said in this record and in argument as to the alteration of the bill of lading, and the circumstances under which the bill was signed, as wholly immaterial in this case. The addition of the words "water permitting" did not change the character of the contract, as they are

embraced under the general exception, "the act of God:" See Angell on Carriers, secs. 289, 333, and note 2.

The first question for our determination upon the record before us, which it is material to consider, is what was the obligation of the plaintiff in error under this contract as a common carrier.

Admitting that this bill of lading was intended as a contract to deliver the goods to the defendants in error at Aberdeen (which seems not to have been expressed on its face), the carrier was bound first to proceed without deviation from the usual and ordinary course to the place of delivery. He was next bound to deliver the goods to the consignees in safety at all events, excepting the act of God, the public enemies, and the act or conduct of the owners. He was bound to make delivery in a reasonable time and with reasonable expedition, as no time of delivery is specified in the contract. For, says Mr. Angell, in his work on carriers, sec. 283, the duty to deliver, within a reasonable time, is a term ingrafted by legal implication upon a promise or duty to carry generally. See also *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54, cited in note, and numerous other cases cited. "What would be reasonable time must be determined, under all the circumstances, with a view to the condition of the river, the season of the year, the state of the weather," etc.: See Angell on Carriers, sec. 289, and notes p. 288; *Hadley v. Clarke*, 8 T. R. 259; *Story on Bailments*, sec. 545 a.

Again: the obligation of the carrier to deliver according to his contract is only suspended during any temporary obstruction. It is not thereby avoided: Angell on Carriers, sec. 289, and cases cited. Hence, plaintiff in error was bound, notwithstanding the hinderance of navigation by low water, to deliver defendant's goods in safety as soon as he could by reasonable diligence after the removal of the unavoidable cause of delay: See also *Id.*, sec. 294.

From the obligation to deliver, at all events, the carrier may, under certain circumstances, be excused. And among these, the same learned author mentions the following: "If the owner or shipper is induced from any cause to accept the goods short of the place to which they were first intended to be conveyed, the carrier is not only discharged from liability further, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued:" Angell on Carriers, p. 330, sec. 331.

The acceptance of the goods voluntarily from the warehouseman, knowing that the voyage had been abandoned on account of the low water, and paying these charges for storage, will ex-

cuse delivery, and discharge the carrier from further liability therefor: See *Rossiter v. Chester*, 1 Doug. (Mich.) 154; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Lorent v. Kentring*, 1 Nott & M. 132.

In the case before us, the proof is clear, by the testimony of the parties themselves, that they did accept the goods at Gainesville, paid the freight and storage, and hauled the goods to Aberdeen—all except the iron—long before the plaintiff in error could have complied with his contract, or was bound to have made delivery under the facts in proof. By this acceptance, we have seen that the plaintiff in error was discharged from all subsequent liability or responsibility on account of his contract. Until the goods were so accepted, the carrier was entitled to no compensation before delivery, and was bound for all charges and expenses incurred in the preservation of the goods, and all damage or injury impairing their value while in his possession. After acceptance, he was only entitled to his *pro rata* share of the freight. If he received more than the usual freight from Mobile to Gainesville, he is liable to the defendants in error for such overplus, if they have been compelled to pay it, or have paid it to him or to his agents or factors, in order to obtain their goods.

After acceptance of the goods at Gainesville by the owners, the carrier was not bound for the expenses of transportation from thence to Aberdeen.

In view of the case here presented, the fourth, fifth, sixth, seventh, eighth, ninth, and tenth instructions were erroneous, and the verdict of the jury for a greater sum than the testimony warranted under the principles above stated.

Let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

99. GEISMER V. LAKE SHORE AND MICHIGAN
SOUTHERN RAILWAY CO.,

102 N. Y. 563; 7 N. E. R. 828; 55 Am. R. 837. 1886.

Action for delay in transporting live stock. Judgment for plaintiff.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this cause.

A railroad carrier stands upon the same footing as other

carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. *Wibert v. N. Y. & Erie Railroad Co.*, 12 N. Y. 245; *Blackstock v. N. Y. & Erie Railroad Co.*, 20 N. Y., 48, 75 Am. Dec. 372.

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods entrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employees for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they wilfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious law breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or

seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike—from the refusal of the employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. *Pittsburgh & C. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Pittsburg, C. W. St. L. R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Bennett v. Lake Shore, etc., R. Co.*, 6 Am. & Eng. R. Cas. 391; *I. & W. L. R. Co. v. Juntgen*, 10 Bradwell (Ill. App.), 295.

The cases of *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474, and *Blackstock v. N. Y. & Erie R. Co.*, 1 Bosw. 77; affirmed, 20 N. Y. 48, 75 Am. Dec. 372, do not sustain the plaintiff's contention here. If in this case the employees of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are therefore of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

CHAPTER XII.

B. LIABILITY UNDER SPECIAL CONTRACT.

100. HOLLISTER V. NOWLEN,

19 Wend. (N. Y.) 234; 32 Am. D. 455. 1838.

Action against the proprietors of a stage-coach as common carriers for the loss of a trunk which had been strapped in the hoot of the stage. Three miles out it was discovered that the straps had been cut and the trunk stolen. Notices that baggage was carried at the risk of the owner were posted in the stage office and in other public places.

By Court, BRONSON, J. Stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident, or the public enemies. As the point, though made, was not discussed by the defendant's counsel, I shall content myself with referring to a few cases to prove that they are liable, as common carriers, for the loss or injury of the property of the passenger: *Orange Co. Bank v. Brown*, 9 *Wend. (N. Y.) 85*, 24 *Am. D. 129*; *Camden Company v. Burke*, 13 *Wend. (N. Y.) 611*, 28 *Am. D. 488*; *Brooke v. Pickwick*, 4 *Bing. 218*; 4 *Esp. 177*; 2 *Kent, 601*. The fact that the owner is present, or sends his servant to look after the property, does not alter the case: *Robinson v. Dunmore*, 2 *Bos. & Pul. 418*. *Chambre, J.*, said: "It has been determined, that if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." The liability of a carrier is like that of an inn-keeper; and it was said in *Cayle's Case*, 8 *Co. 63*, that "it is no excuse for the inn-keeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the door open; but he ought to keep the goods and chattels of his guest there in safety." When there is no fraud, the fact that the owner accompanies the property, can not affect the principle on which the carrier is charged in case of loss.

The principal question in the cause arises out of the notice given by the coach proprietors, that baggage carried by the Telegraph line would be at the risk of the owner; and the first inquiry is, whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it cannot be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving actual notice to the owner of the property. I agree to the rule laid down by Best, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, decided in 1827, when the courts of Westminster hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back on the firm foundation of the common law. He said: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."

I should be content to place my opinion upon the single ground, that if a notice can be of avail, it must be directly brought home to the owner of the property; and that there was no evidence in this case which could properly be submitted to a jury to draw the inference that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed; and there is another case before the court where the judge at the circuit thought the evidence sufficient to charge the plaintiff with notice. It will therefore be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? Without intending to go much at large into this vexed question, it will be necessary to state some leading principles relating to the duties and liabilities of the carrier, and the ground upon which his responsibility rests. The rules of the common law in relation to common carriers are simple, well defined, and what is no less important, well understood. The carrier is liable for all losses except those occasioned by the act of God or the public ene-

mies. He is regarded as an insurer of the property committed to his charge, and neither destruction by fire, nor robbery by armed men, will discharge him from liability. Holt, C. J., in pronouncing his celebrated judgment in the case of *Coggs v. Bernard*, 2 *Ld. Raym.* 918, said: "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing." In *Forward v. Pittard*, 1 *T. R.* 27, where the carrier was held liable for a loss by fire, Lord Mansfield said, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." And in relation to a loss by robbery he said: "The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this state: *Colt v. McMechen*, 6 *Johns. (N. Y.)* 160, 5 *Am. D.* 200; *Elliot v. Rossell*, 10 *Johns. (N. Y.)* 1, 6 *Am. D.* 306; *Kemp v. Coughtry*, 11 *Id.* 107. In *Roberts v. Turner*, 12 *Johns. (N. Y.)* 232, 7 *Am. D.* 311, Spencer, J., said, the carrier, "is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud."

A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services, and the hazard which he incurs: 2 *Ld. Raym.* 917; *Bac. Abr., Carriers B, Skin.* 279; 1 *Salk.* 249, 250; 5 *Bing.* 217; 3 *Taunt.* 272, *per* Lawrence, J.; 2 *Kent.* 599; *Story on Bail.* 328; *Jeremy on Carriers*, 59.

It has been said that the carrier is liable in respect of his reward: *Lane v. Cotton*, 1 *Salk.* 143. Lord Coke says, "he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him:" *Co. Lit.* 89 a. The carrier may no doubt demand a reward proportioned to the services he renders and the risk he incurs; and having taken it, he is treated as an insurer, and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract: it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person

who may agree to carry goods from one place to another; and yet, one who does not usually exercise this public employment, will incur no responsibility beyond that of an ordinary bailee for hire; he is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law which determines the extent of the carrier's liability. In *Ansell v. Waterhouse*, 2 Chit. 1, which was an action on the case against the proprietor of a stage-coach for an injury to the plaintiff's wife, Holroyd, J., said: "This action is founded on what is quite collateral to the contract, if any; and the terms of the contract, unless changing the duty of a common carrier, are in this case quite immaterial. The declaration states an obligation imposed upon him by the law. This is an action against a person, who, by an ancient law, held, as it were, a public office, and was bound to the public. This action is founded on the general obligation of the law." In *Forward v. Pittard*, 1 T. R. 27, Lord Mansfield said: "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer." See also *Hide v. Proprietors etc.*, 1 Esp. 36.

The law in relation to carriers has in some instances operated with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law, is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad, that it will sometimes operate harshly. It was well remarked by Best, C. J., in *Riley v. Horne*, 5 Bing. 217, that "when goods are delivered to the carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." These remarks lose little of their force when applied to the case of passengers in stages, steam-

boats, and railroad cars. For although they are in the neighborhood of their property, it is neither under their eye, nor have they any efficient means of protecting it against the consequences of negligence and fraud. The traveler is usually among strangers; his property is in the hands of men who are sometimes selected with little regard to their diligence and fidelity; and if the remedy of the owner in case of loss depend on the question of actual negligence or fraud, he must make out his right to recover by calling the very men whose recklessness or frailty has occasioned the injury. It was remarked by Best, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, that "though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against."

There is less of hardship in the case of the carrier than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system, which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the common law.

The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer prevailed in England for only a short period. In *Smith v. Horne*, 8 Taunt. 144, Burrough, J., said: "The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall, in 1804, when the case of *Nicholson v. Willan*, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the

right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." Whatever may be the rule where there is in fact a special contract, the learned judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793), Lord Kenyon had expressly laid down a different rule in *Hide v. Proprietors etc.*, 1 Esp. 36. He said, "There is a difference where a man is chargeable by law generally, and where on his contract. Where a man is bound to any duty and chargeable to a certain extent by the operation of law, in such case, he can not by any act of his own discharge himself." And he put the case of common carriers, and said, they cannot discharge themselves "by any act of their own, as by giving notice, for example, to that effect." This case was afterwards before the king's bench, but on another point: 1 T. R. 389.

The doctrine in question was not received in Westminster Hall without much doubt, and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the ser-

vant could read; these, and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law: See 1 Bell's Com. 474. After years of litigation, parliament interfered in 1830, and relieved both the courts and the public, by substantially re-asserting the rule of the common law: Stat. 1, Wm. IV., c. 68.

Without going into a particular examination of the English cases, it is sufficient to say that the question has generally been presented, on a notice by the carrier that he would not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; and the decisions have for the most part only gone far enough to say, that if the owner do not comply with the notice by stating the true value of the goods, and having them properly entered, the carrier will be discharged. In these cases, the carrier had not attempted to exclude all responsibility. But there are two *nisi prius* decisions which allow the carrier to cast off all liability whatever. In *Maving v. Todd*, 1 Stark. 72, the defendant had given notice that he would not answer for a loss by fire, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In *Leeson v. Holt*, 1 Stark. 186, tried in 1816, he made a like decision; though he very justly remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; since by the common law a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the courts had departed from the law of the land, and allowed, what Jeremy's Treatise on Carriers, 35, 36, very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud: *Batson v. Donovan*, 4 Barn. & Ald. 21; others on the notion of a special acceptance or special contract: *Nicholson v. Willan*, 5 East, 507; *Harris v. Packwood*, 3 Taunt. 271; while in some instances it is difficult to say what general principle the court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care

which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. The case of *Kenrig v. Eggleston*, Aleyn, 93, was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying, "there was a book and tobacco in the box," when in truth it contained one hundred pounds in money, besides. Rolle, J., thought the carrier was nevertheless liable for a loss by robbery; "but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages." The jury, however, found the whole sum (abating the carriage), for the plaintiff, *quod durum videbatur circumstantibus*. In *Gibbon v. Paynton*, 4 Burr. 2298, Lord Mansfield said, this was a case of fraud and he "should have agreed in opinion with the *circumstantibus*." In *Tyly v. Morrice*, Carth. 485, two bags of money sealed up were delivered to the carrier, saying they contained two hundred pounds, and he gave a receipt for the money. In truth the bags contained four hundred and fifty pounds, and the carrier having been robbed, paid the two hundred pounds; and in this action brought to recover the balance, the chief justice told the jury, that "since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant." And the same point was decided in another action against the same carrier. In *Gibbon v. Paynton*, 4 Burr, 2298, one hundred pounds in money was hid in hay in an old nail-bag, which fact the plaintiff concealed from the carrier; and the money having been stolen, the court held that this fraud would discharge the defendant. In the case of the *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. D. 129, the agent of the plaintiffs put eleven thousand dollars in bank bills in his trunk, and delivered it to the captain of the steamboat as his baggage. The court held that the term baggage would only include money for the expenses of traveling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiff's agent was a virtual concealment as to the money, that "his representation of his trunk and the contents as baggage, was not a fair one, and was calculated to deceive the captain." The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly: *Phillips v. Earle*, 8 Pick. 182.

Fraud cannot, I think, be imputed to the owner from the mere fact that he delivers goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should

inquire at the time the goods are delivered; and then if he is not answered truly he will have a defense: See 4 Bing. 218. A different rule practically changes the burden of proof. At the common law, it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. But this doctrine of implying fraud from a notice, requires him to go further, and show that he complied with the terms of the advertisement. He may have informed the carrier truly of the value of the goods: there may be no fraud, but still he is required to prove himself innocent before he can recover. Independent of a notice, the *onus* would rest, where upon general principles it ought to rest, on him who imputes fraud; and the carrier could not discharge himself without showing some actual misrepresentation or fraudulent concealment. It does not lie on the employer to show how the loss was occasioned, or that he has acted properly; but the law presumes against the carrier, until he proves that the loss happened by means or under circumstances for which he is not answerable: 1 T. R. 33; *Murphy v. Staton*, 3 Munf. (Va.) 239; *Story on Bail*. 338.

But it is enough for this case, that the question of fraud can never arise under such a notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum, unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier is, that a special contract may be inferred from the notice. Independent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. Nox (Maxims), 92, after speaking of a loss by negligence, says: "If a carrier would refuse to carry unless a promise were made to him that he should not be charged with any such miscarriage, that promise were void." If he cannot stipulate for a partial, it is difficult to see how he can for a total exemption from liability. In *Nicholson v. Willan*, 5 East, 513, Lord Ellenborough found no direct adjudication in favor of the position that a carrier may limit his responsibility by a special contract; but he relied on the fact that such an exemption had never been "by express decision denied." Although this mode of reasoning is not the most conclusive, I shall not deny that the carrier may, by express contract, restrict his liability; for, though the point has never been expressly ad-

judged, it has often been assumed as good law: *Aleyn*, 93; 4 Co. 84, note to *Southcote's case*; 4 Burr. 2301, *per Yates*, J; 1 Vent. 190, 238; *Peak. N. P. Cas.* 150; 2 Taunt. 271; 1 Stark. 186. If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the goods, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that in relation to that transaction he shall throw off his public character, and like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law.

But conceding that there may be a special contract for restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, can not warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden

of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice, makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defense of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation. The doctrine that a carrier may limit his responsibility by a notice, was wholly unknown to the common law at the time of our revolution. It has never been received in this, nor, so far as I have observed, in any of the other states. The point has been raised, but not directly decided: *Barney v. Prentiss*, 4 Har. & J. (Md.) 317, 7 Am. D. 670; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. D. 133. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence.

The act of parliament already mentioned enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss or injury of those articles when the value exceeds ten pounds, unless at the time of delivery the owner shall declare the nature and value of the property, and pay the increased charge which the carrier is allowed to make for his risk and care. If the owner complies with this requirement, the carrier must give him a receipt for the goods, "acknowledging the same to have been insured;" and if he refuse to give the receipt, he remains "liable and responsible as at the common law." The provision extends to the proprietors of stage-coaches as well as to all other carriers, and to property which may "accompany the person of any passenger" as well as other goods; and the statute declares that after the first

day of September, 1830, "no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any wise affect the liability at common law" of any carriers; but that all and every such carrier shall be "liable as at the common law to answer" for the loss or injury of the property, "any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." The only modification of the common law rule in relation to carriers made by this statute, is that which requires the owner, without a special request, to disclose the nature and value of the package, when it contains articles of a particular description. The premium for care and risk, the carrier might have required before. In relation to all articles not enumerated, and in relation to those also, if the owner comply with the requirements of the act, the carrier is declared liable as an insurer, and must answer "as at the common law." The whole doctrine which has sprung up under notices, is cut up by the roots; and in such language as renders it apparent that the legislature deemed it an innovation on the law of the land.

If after a trial of thirty years the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common law rule; we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud.

If the policy of the law in relation to carriers were more questionable than I think it is, it would be the business of the legislature, and not of the courts, to apply the proper remedy. The plaintiff is entitled to judgment in pursuance of the stipulation contained in the case.

The chief justice concurred.

COWEN, J., concurred in the result for the reasons assigned by him in the case of *Cole v. Goodwin and Story*, 19 Wend. 251, 32 Am. D. 470.

Judgment for the plaintiff.

101. BOSTWICK V. BALTIMORE AND OHIO RAIL-
ROAD CO.,

45 N. Y. 712. 1871.

Action to recover the value of 16 bales (part of 54 bales) of cotton, shipped from Cincinnati to New York, and lost at sea between Baltimore and New York. No bill of lading was delivered at the time, but one or two days afterward the agent of defendant sent to plaintiff bills of lading containing printed conditions limiting liability to the carrier in whose possession the goods might be at the time of loss, and excusing from loss or damage by the dangers of navigation. Judgment for defendant.

RAPALLO, J. (Omitting a question of agency.) There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke for the transportation of the fifty-four bales through to New York by "all rail," and agreed to pay the all rail route. The goods were shipped under this verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff. The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this.

If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped.

In the case of *Corey v. The N. Y. Cent. R. R. Co.*, decided in April, 1871, not reported, we held that conditions contained in a bill of lading, not delivered until after the shipment and loss of the goods, though before the loss was known, did not control the rights of the shippers.

The present case is analogous in principle to the one cited.

The goods having been shipped under an agreement that they should be carried "all rail," a loss occasioned by their being carried by sea is no excuse for their non-delivery to the plaintiff.

There was also some evidence of delay in sending forward the portion of the goods which was lost. This delay, unexplained, tended to show negligence on the part of the defendant. It is true that there is no allegation of negligence in the complaint. But the complaint alleges the non-delivery of the goods, which was a breach of duty on the part of the defendant, unless excused.

The defendant sets up, in excuse, the conditions of the bill of lading, and the loss of the goods by the dangers of navigation. Even if the conditions were binding upon the plaintiff, it was competent to rebut this defense by showing that the goods became exposed to the danger by reason of the default of the defendant, and that if they had been forwarded with due diligence, they would not have been on board of the vessel which was lost. (*Michaels v. The N. Y. Cent. R. R. Co.*, 30 N. Y. 564, 86 Am. D. 415).

If there was negligence on the part of the defendant in sending forward the goods, the conditions of the bill of lading would not exempt the defendant from liability.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

102. RANCHAU V. RUTLAND RAILROAD CO.,

71 Vt. 142; 43 Atl. R. 11; 76 Am. St. R. 761. 1899.

Case, for loss of a box checked by plaintiff on a ticket from Burlington, Vermont, to Fitchburg, Massachusetts. It appeared that no such box was put on the train on which plaintiff traveled, and no trace of it could be found.

Ross, C. J., (Omitting questions of pleading.) 3. The ticket sold by the defendant to the plaintiff contained a clause stating that the defendant, "in selling the ticket and checking baggage hereon acts as agent, and is not responsible beyond its own line." The verdict of the jury finding that the loss occurred on the defendant's own line, renders a consideration of this clause immaterial. It also contains a clause stating, "Baggage liability of any company is limited to wearing apparel not exceeding one hundred dollars in value." The special verdict finds that the plaintiff's damages were one hundred and fifty-eight dollars, of which one hundred and forty-three dollars was for wearing apparel. The defendant contends that the court erroneously, against its exception, rendered a judgment

for the largest sum named. This attempt of the defendant to limit its common-law liability as a common carrier must be considered with reference to the other undisputed facts stated in the exceptions. It is there stated that the evidence tended to show that the plaintiff could neither read nor write; that the tickets were not read to him by any person, and that he did not know the provisions of the tickets. With this testimony in the case, the defendant was not entitled to have the court comply with its four requests: "That the plaintiff is bound by the terms of the contract set forth on his ticket; that by said contract the defendant is only liable for loss of baggage occurring on its own line; that defendant's liability is limited to wearing apparel as specified in the contract; that the defendant's liability is limited to wearing apparel not exceeding one hundred dollars in value." These requests all assume that such a contract existed between the plaintiff and defendant. This assumption was not warranted by the testimony in the case.

The defendant by its charter became a common carrier of passengers and their baggage, subject to the common-law rules in regard to liability therefor. By nearly universal concurrence of decisions of courts of final resort, including the decisions of this court, such carrier may by contract reasonably limit and vary its common-law liability, except as to its own negligence. But, being by its charter and occupation subject to the common-law liability, it will be held to that liability unless it establishes that it has limited or varied it by a contract, express or implied, existing between it and its passenger. The ordinary passenger ticket does not profess to contain the contract by which the passenger obtains his right to carriage over the road of the carrier. It is only a receipt, or token, given by the carrier for the passenger to show to its servants and managers of its trains, that he has purchased the right to be safely carried on its trains between the stations specified. In this respect it is different from a bill of lading for the carriage of freight. Whatever is printed on passenger tickets has usually been regarded as a notice by the carrier of its desire to limit or vary its common-law liability. To effect such limitation, the carrier must show that the passenger, when he paid his money and received the ticket, did it under such circumstances that he assented to the conditions named upon the ticket. Whether such assent is established depends upon the circumstances of each case. Assent will not be presumed unless a knowledge of the proposed conditions and limitations are known by the passenger, and then much will depend upon whether they are reasonable or unreasonable. If not entirely reasonable, assent will

not be presumed from knowledge merely, because the carrier without such assent is under the common-law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them; but express assent must be established. As the defendant took no exceptions to the charge on the subject of the special findings of the jury, it is to be presumed that the court stated the law correctly in regard thereto, and that the jury found, as the plaintiff's testimony tended to show, that he had no knowledge of the conditions placed by the defendant upon his ticket at the time he purchased it. He must have had knowledge of them at the time he paid his money. When purchasing the ticket, the passenger frequently has no opportunity nor time to examine it. He has a right to understand, unless directly informed to the contrary, that the carrier's undertaking has the common-law liability. It is unreasonable to hold, if the conditions printed on the ticket come to his knowledge first after he has entered upon his journey, that he should be held to have assented thereto.

His assent may well be assumed when he knows that the carrier is selling special tickets at reduced rates, with the conditions and limitations plainly stated in the notices of the sale of such special tickets: 3 Am. & Eng. Ency. of Law, tit. Baggage, Duty to Carry, 543, and notes, Limitation of Liability, 554, and notes; 5 Am. & Eng. Ency. of Law tit. carriers of passengers, Limitations of Liability, 608, 612, and notes; Bissell v. New York Cent. R. R. Co., 25 N. Y. 442, 82 Am. Dec. 369, and note; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455, and note; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470, and note; Newell v. Smith, 49 Vt. 255; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Kimball v. Rutland etc. R. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Farmers' etc. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Thorp v. Concord R. R. Co., 61 Vt. 378, 17 Atl. R. 791; Gillis v. Western Union Tel. Co., 61 Vt. 461, 17 Atl. R. 736, 15 Am. St. R. 917; Hodd v. Express Co., 52 Vt. 335, 36 Am. Rep. 757; Davis v. Central Vermont R. R. Co., 66 Vt. 290, 29 Atl. R. 313, 44 Am. St. R. 852; In Davis v. Central Vt. R. R. Co., where a bill of lading is considered, it is said in regard to notices: "Notice, unless brought distinctly to the knowledge of the consignor in such a manner that the law

§§ 102, 103 LIABILITY UNDER SPECIAL CONTRACT.

will imply his assent to the limitation contained in the notice, will not be considered as entering into and forming a part of the contract." The special verdict does not establish that the plaintiff had knowledge of the conditions printed upon his ticket, and his assent thereto will not be implied. The defendant rests under the common-law liability in regard to the loss of the baggage. That liability, as held in *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646, entitles the plaintiff to recover for the bedding lost, or for his entire loss. . . .

Reversed and cause remanded because of improper remarks of plaintiff's counsel.

103. RAILROAD CO. V. LOCKWOOD,

17 Wallace (U. S.) 357. 1873.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than traiff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negli-

gence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

Mr. Justice BRADLEY delivered the opinion of the court.

It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire unless caused by their own design or neglect; and from re-

sponsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.

But since the decision of the case of *The New Jersey Steam Navigation Company v. Merchants' Bank*, by this court, in January Term, 1848, 6 How. 344, it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of the *New Jersey Steam Navigation Company v. Merchants' Bank*, above adverted to, grew out of the burning of the steamer *Lexington*. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was de-

troyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them from misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that state to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for ex-

emption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr v. The New Jersey Steam Navigation Company*, 4 Sandf. 136, decided in 1850. This case also arose out of the burning of the *Lexington*, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities,—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank*, in 6th Howard, and such we consider to be the law in the present case." And in *Stoddard v. Long Island Railroad Company*, 5 Sandf. 180, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decisions to that of the Supreme Court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases, all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence. 13 Barb. 353, 14 Barb. 524.

It was not till 1858, in the case of *Welles v. New York Central Railroad Company*, 26 Barb. 641, that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger traveling on a free ticket, which exempted the company from liability. In 1862 the

Court of Appeals, 24 N. Y. 181, by a majority affirmed this judgment, and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the traveling public. *Perkins v. The New York Central Railroad Company*, 24 N. Y. 196, 82 Am. D. 281, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith v. The New York Central Railroad Company*, 29 Barbour, 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected, by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the Court of Appeals in 1862 by a vote of five judges to three. 24 N. Y. 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is

carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, *Bissell v. The New York Central R. R. Co.*, 29 Barb. 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "*whether of negligence by their agents, or otherwise,*" for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, 25 N. Y. 442, 82 Am. D. 369, four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by *Welles v. The Central Railroad Company*; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its

charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher v. New York Central Railroad Company*, 49 N. Y. 263, 10 Am. R. 364, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts which, by dicta or decision either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." 32 N. Y. 337, 88 Am. D. 332.

(Omitting the consideration of cases decided in other states.)

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to

value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice." But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking. Justice Story, in his work on bailments, originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of *Peek v. The North Staffordshire Railway Company*, 10 H. L. Cas. 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr v. Lancashire Railroad Company*, 7 Ex. 707, and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal

companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present. It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of *The New Jersey Steam Navigation Company v. Merchants' Bank*. On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to carriers of passengers, Mr. Justice Grier, in the case of *Philadelphia and Reading Railroad v. Derby*, 14 How. 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of *The Steamboat New World v. King*, 16 How. 469, 474, which was also the case of a free passenger, carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

In *York Company v. Central Railroad*, 3 Wall. 113, the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can

perceive no just reason for refusing its recognition and enforcement." In the case of *Walker v. The Transportation Company*, 3 ib. 150, decided at the same term, it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Company v. Kountze Brothers*, 8 ib. 342, 353, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if

by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin. (2 Ohio St. 131, 4 id. 362, 2 Rich. 286, 9 id. 201, 37 Ala. 247.)

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating

the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential* duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. The New Jersey Steam Navigation Company*, *supra*, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason

that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the

character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, careless-

ness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

104. MYNARD V. SYRACUSE, ETC., RAILROAD CO.,

71 N. Y. 180; 27 Am. R. 28. 1877.

Action to recover from a common carrier for the loss of a steer resulted in judgment for defendant.

CHURCH, C. J. The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defense rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising" should be taken to include a loss accruing by the negligence of the defendants or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or willful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the

acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words *from whatever cause arising* may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. NELSON, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this State. In *Alexander v. Green*, 7 Hill 533, the stipulation was to tow plaintiff's canal boat from New York to Albany *at the risk* of the master and owners, and the Court of Errors reversed a judgment of the Supreme Court with but a single dissenting vote, and decided that the language did not include a loss occasioned by the negligence of the defendants or their servants. In one of several opinions delivered by members of the court, it was said, in respect to the claim for immunity for negligence: "To maintain a proposition, so extravagant as this would appear to be, the stipulation of the parties ought to be most clear and explicit, showing that they comprehend in their arrangement the case that actually occurred."

Wells v. Steam Nav. Co., 8 N. Y. 375, expressly approved of the decision of *Alexander v. Greene*, and reiterated the same principle. GARDNER, J., in speaking of that case, said: "We held, then, if a party vested with a temporary control of another's property for a special purpose of this sort would shield

himself from responsibility on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to usage and the general understanding of men of business, would not be implied from a general expression to which effect might otherwise be given."

So, in the Steinweg Case, 43 N. Y. 123, 3 Am. R. 673, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the Magnin Case, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid."

It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence, JOHNSON, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that he expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of Lockwood v. Railroad Co., 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice BRADLEY in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the question cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 id. 485; 24 id. 181-196; 25 id. 442; 42 id. 212; 49 id. 263; 51 id. 61.

The remedy is with the legislature, if remedy is needed. But,

upon the question involved here, it is correctly stated in that case, that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uniform course of decisions in this and most of the other States, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

There was a period when the courts of England were inclined to relax this rule, and this led to the adoption of an act of Parliament on this subject, under which the courts have since acted. See 10 House of Lords Cases, 473.

It is argued that the rule does not apply to the carriage of animals; that, in respect to such property, the common-law liabilities of common carriers do not attach; that the carrier is only liable for negligence, and hence that the stipulation can apply to nothing else.

There might be some force in this point, if the position that carriers of animals are only liable for negligence or misconduct is correct. But that position cannot be maintained. The liability of carriers of animals is modified only so far as the cause of damage for which recompense is sought, is a consequence of the conduct or propensities of the animals undertaken to be carried. In other respects, the common-law responsibilities of the carrier will attach. This was expressly held in *Clarke v. Rochester & S. R. R. Co.*, 14 N. Y. 573, 67 Am. D. 205, DENIO, J., said: "But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee for hire of animals is bound to exercise; and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule; and, considering the law of carriers to be established upon consideration of sound

policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exemption requires." The case of *Palmer v. Railway Co.*, 4 Mees. & Wels. 749, is cited, where the same principle is decided. Animals may die of fright, by refusing to eat, or break from their fastenings, and kill themselves, although every proper precaution was used; but there may be many accidents producing loss or injury to animals which are not attributable to acts of God, and which were not caused by the peculiar character of the property. By the act of God is meant something which operates without any aid or interference from man. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. D. 292. In that case it was held that the carrier was liable for the value of a span of horses lost by the sinking of a steamboat, caused by coming in contact with the mast of a sloop which had been sunk in a squall two days before. The court decided that sinking the steamboat was not caused by the act of God, and that the sinking of the sloop, although by the act of God, was too remote, and many accidents might happen producing loss to animals for which the carrier would be liable, although no fault or negligence could be imputed; and in respect to such, the common-law liability would attach. Angell on Carriers, p. 180, lays down the same rule. The same qualification of liability applies to all property.

The carrier is excused from liability for loss caused by inherent infirmity or tendency to decay. It has been held that a carrier is not responsible for the evaporation of liquids, nor for the diminution of molasses, caused by the oozing through vent holes necessary to prevent the bursting of barrels (Angell on Carriers, § 211, and cases cited); and exemptions from liability for loss by inherent qualities of animals, rests upon the same principle. Beyond this the common-law liabilities exist against the carrier of animals the same as the carrier of other property, and the clause in the contract can, therefore, operate in many cases where negligence cannot be imputed.

In *Massachusetts v. Smith v. R. R. Co.*, 12 Allen, 531, the court says: "The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property." The qualification above referred to, excusing the carrier from liability of loss occasioned by the nature and character of the property, is recognized. The qualification or exception, as before stated, is applicable to all property, and does not affect the common-law liabilities to any greater extent than

§§ 104, 105 LIABILITY UNDER SPECIAL CONTRACT.

in respect to other property, except that the instances may be more numerous where the carrier will be excused. In Angell on Carriers, § 214, it is said: "Such a case would seem to be analogous to the case of loss of merchandise owing to some inherent defect which caused the destruction of it while in transit." As well might carriers be exempted from common-law liabilities for loss of inanimate property as for animals, if immunity from loss from inherent defects, or from the nature and character of the property, will produce that result.

The only authority seeming to favor the position of the respondent is in *Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61, 10 Am. R. 559. The loss of the hogs in that case was caused by heat, and the negligence attributed was in not cooling them off with water. We do not think, under the peculiar stipulation, and the character of the property in that case, that it is in conflict within the views before expressed.

The judgment of the General Term must be reversed, and that of the county court affirmed.

All concur, except ANDREWS, J., taking no part; FOLGER, and MILLER, JJ., absent.

Judgment accordingly.

105. HART V. PENNSYLVANIA RAILROAD CO.,

112 U. S. 331, 5 S. Ct. R. 151. 1884.

Action to recover \$19,800 for the death of one race horse and the injury of four others through the negligence of defendant in transporting them. The court below excluded evidence that the horse killed was worth \$15,000 and the others from \$3,000 to \$5,000 each. Verdict for plaintiff for \$1,200.

BLATCHFORD, J. It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts, "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: if horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for

the car load.” Then follow in the first paragraph these words: “But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom.” This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, “a limited liability live-stock contract,” and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while

in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *York Co. v. Central R. R. Co.*, 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 Wall. 264; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655.

In *York Co. v. Central Railroad*, 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred through any want of due care on his part. The court said, that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter."

In *Railroad Co. v. Lockwood*, 17 Wall. 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable, in the eye of the law; (2) It is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was, that the exemption was to have applied to it the test of its justness and reasonable character. It was said, that the contracts of the carrier "must rest upon their fairness and reasonableness"; and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover traveling on a stock train on a railroad, to look after his cattle, and having a free pass for that purpose, who

had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants.

In *Express Co. v. Caldwell*, 21 Wall. 264, this court held, that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law, that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity and care.

On the other hand, in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability for loss by fire occurring through the negligence of a railroad company which it had employed as a carrier.

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; *Relf v. Rapp*, 3 Watts. & Serg. (Pa.) 21, 37 Am. D. 528; *Dunlap*

v. International Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

The principle is not a new one. In *Gibbon v. Paynton*, 4 Burrows, 2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportion-

able to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is *Batson v. Donovan*, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in *Newburger v. Howard*, 6 Philadelphia Rep. 174; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 93 Am. D. 162; *Hopkins v. Westcott*, 6 Blatchford, 64; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. R. 575; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 18 Am. R. 596; *Magnin v. Dinsmore*, 56 N. Y. 168, and 62 N. Y. 35, 20 Am. R. 442, and 70 N. Y. 410, 26 Am. R. 608; *Earnest v. Express Co.*, 1 Woods, 573; *Elkins v. Empire Transportation Co.*, 81 Penn. St. 315; *South & North Alabama R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. R. 578; *Same v. Same*, 56 Id. 368; *Muser v. Holland*, 17 Blatchford, 412; *Harvey v. Terre Haute R. R. Co.*, 74 Missouri, 538; and *Graves v. Lake Shore & M. S. R. R. Co.*, 137 Mass. 33, 50 Am. R. 282. The contrary rule is sustained in *Southern Express Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. 271; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. R. 244, 42 Am. R. 713; *Chicago, St. Louis & N. O. R. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City etc. Railroad Co. v. Simpson*, 30 Kan. 645, 2 Pac. R. 821, 46 Am. R. 104; and *Moulton v. St. Paul etc. R. R. Co.*, 31 Minn. 85, 16 N. W. R. 497, 47 Am. R. 781. We have given consideration to the views taken in these cases, but are unable to concur in their conclusions. Applying to the case at hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-

§§ 105, 106 LIABILITY UNDER SPECIAL CONTRACT.

enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 245, 93 Am. D. 162, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is affirmed.

106. MOULTON V. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY CO.,

31 Minn. 85; 47 Am. R. 781. 1883.

Action for the value of horses lost through the negligence of the carrier. Plaintiff secured a verdict for full value of horses.

DICKINSON, J. The plaintiffs shipped two car-loads of horses at St. Paul, over defendant's line of road, to points in Dakota. Two of the horses died by reason of prolonged exposure to cold weather, as is claimed, caused by defendant's negligent detention of the train during transportation. The action is for the recovery of the value of these two horses, which appears to have been \$200 each. For the purposes of this appeal, we are to consider the negligence of the defendant as established, and are to determine whether the defendant is liable for its negligence, and the measure or extent of its liability under the contract made by the parties.

The contract under which the property was shipped, and which was executed by both plaintiffs and defendant, contained the provisions that in consideration that the defendant would transport the property at the rate of \$75 per car-load, "the same being a rate given, subject to the conditions of this contract," the plaintiffs released the defendant from the liability of a common carrier, and from any liability for any delay in shipping the stock after its delivery to the defendant, and agreed that the liability of the defendant should be only that of a private carrier for hire. The plaintiffs contracted to assume all risk of damage which might be sustained by reason of any delay in transportation, and all risk of damage from any other cause, not resulting from the willful negligence of the agents of the defendant. It was further agreed, that in case of total loss, the damage should in no case exceed the sum of \$100 per head, and in case of partial loss, damage should be measured in the same proportion. A printed "regulation" of the defendant, attached to the contract, provided that the defendant would not assume any liability over \$100 per head on horses and valuable livestock, except by special agreement. By the contract of the parties the owner of the horses attended and cared for them upon the passage, without extra charge for his own transportation.

A railroad company which undertakes to transport live-stock for hire, for such persons as choose to employ it, assumes the relation of a common carrier, and becomes chargeable with the duties and obligations which are incident to that relation. *Kimball v. Rutland & B. R. R. Co.*, 26 Vt. 247, 62 Am. D. 567; *Rixford v. Smith*, 52 N. H. 355, 13 Am. R. 42; *Clarke v. Rochester & S. R. R. Co.*, 14 N. Y. 570, 67 Am. D. 205; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 15 Am. R. 19; *St. Louis & S. E. Ry. Co. v. Dorman*, 72 Ill. 504; *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414, 75 Am. D. 564; *Great Western Ry. Co. v. Hawkins*, 18 Mich. 427, 433.

By this it is not meant that the carrier is an insurer of the property as respects injury which it may suffer from all causes. Such a liability does not exist without qualification as to personal property generally in the hands of a carrier. He is not, for instance, an insurer in respect to any injury unavoidably resulting from the essential nature of the property itself, such as the natural decay of fruit, although he should use reasonable care for its preservation. For like reasons as those upon which rest the exceptions to the absolute obligation of the carrier, as respects property generally, it is undoubtedly true that the ordinary common-law liability of the carrier is subject to some modifications arising from the nature and propensities of the animals, and their capacity for inflicting injuries upon themselves and upon each other, when live-stock is the subject of transportation. What may be the nature and extent of such modifications we have no occasion now to consider. For our present purposes it is enough to say that cases where the injury is the result of want of ordinary care on the part of the carrier are not within the exceptions to the rule. See cases above cited.

The recovery in this case rests alone upon the neglect of the defendant to transport the horses to their destination within a reasonable time, whereby, from exhaustion and exposure to cold, they died. The law has been determined in this State, and in most of the United States, as well as in the Federal Supreme Court, to be that a common carrier of goods cannot by contract relieve himself from liability for his own negligence. *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. R. 122; *Shriver v. Sioux City & St. P. R. R. Co.*, 24 Minn. 506, 31 Am. R. 353; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174. Nor is there any reason why a different rule should prevail in respect to the transportation of live-stock, or of property under the care of the owner. The rule itself rests upon considerations of public policy, and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking. These reasons apply with undiminished force where the property is live-stock, or is under the care of the owner, who has not the direction or control of the agencies and the operation of the transportation. To whatever extent such facts might modify or affect the liability of the carrier for accidents, or for injuries not the result of his own negligence, they would not qualify his responsibility for his own neglect of duty. The agreement discharging the defendant from the liability of a common carrier cannot avail to

divest the carrier of his real character, nor indirectly relieve him from responsibilities from which he cannot directly by contract free himself. *Christenson v. American Express Co., supra*; *Bank of Kentucky v. Adams Express Co., supra*.

Our conclusion therefore is that the defendant was responsible in damages for its negligence, notwithstanding the contract.

The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized.

Upon the face of the contract under consideration, it is apparent that it was not the purpose of the parties to liquidate the damages recoverable, with reference to the value of the property consigned to the carrier. Its provisions are somewhat contradictory, and not easily reconciled. The general regulation attached to the contract, to the effect that the company "will not assume any liability over one hundred dollars per head on horses and valuable live-stock except by special agreement," is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation it is therefore of no effect. The law declares that the carrier shall be liable to the extent of the value of the property, although there be no special agreement. We do not question the right of a carrier to require the disclosure, by the consignor, of the value of the property presented for transportation, where its value is not apparent and well known. This is reasonable, both to the end that proper care may be taken of the property while it is in the hands of the carrier, and because the proper charges for transportation may often

depend largely upon value. We see nothing; however, in this contract which can be regarded as having been intended as calling for such a disclosure on the part of the plaintiffs, or as estopping them from claiming a recovery, upon the ground of the carrier's negligence, of the actual value of the horses. In terms, the contract purports to relieve the defendant from liability, even for its own negligence, and at the same time, if a recovery shall be had notwithstanding this agreement, then the amount of such recovery is limited to the sum of \$100 per head. These stipulations cannot naturally be applied to a case involving as the cause of action the negligence of the carrier, without making them, in effect, to be an agreement in the first place for absolute exemption from liability (except for willful negligence); and if notwithstanding the agreed exemption a recovery should be awarded, it shall not exceed the sum named; that is to say (as applied to a case of negligence), it is, in effect, an agreement for absolute exemption, and that failing to be sustained, then for a partial exemption from the liability which the law imposes in such cases, and which cannot be laid aside by the mere consent of parties. Such a contract cannot be sustained.

Order affirmed.

Compare with *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, *ante* § 105. See also *Alair v. Northern Pacific Railroad Co.*, 53 Minn. 160, 54 N. W. R. 1072, 39 Am. St. R. 588.

107. HANSEN V. FLINT AND PERE MARQUETTE RAILROAD CO.,

73 Wis. 346; 41 N. W. R. 529; 9 Am. St. R. 791. 1889.

Action to recover the value of goods shipped over defendant's line and partially destroyed by fire. Judgment for plaintiffs.

ORTON, J. The facts are substantially as follows: Roundy, Peckham & Co., merchants of the city of Milwaukee, on November 2, 1887, upon an order from Hansen and Kirsh, the respondents, of Onekama, Michigan, shipped to them by the appellant company a large bill of goods. Roundy, Peckham & Co., on that day, sent the goods to the warehouse of the appellant by their drayman, and received in return the following receipt: "Original. — Milwaukee, —, 188—, — Shipped by Roundy, Peckham & Co. the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary de-

lay. — Consigned to Hansen & Kirsh, Onekama, Mich. — Description of articles. — Weight.” Here follows a list of the articles shipped, covering four sheets of paper, upon each of which is the same heading as above, and on the face of the receipt, and on each page or sheet, is stamped by the agent of the appellant company the following: “F. & P. M. R. R. Co.—Rec’d. Nov. 2, 1887.—By Agent—Milwaukee.” On the face of the stamp is written the letter “P.” The stamp was affixed to the receipt by a Mr. Pawlett, the agent of the appellant company, on that day, who wrote the letter “P.” thereon as his initial letter, and the stamp used by him was the one customarily used by the agent for such purpose. A portion only of the goods arrived at Onekama, their destination, the remainder having been burned or damaged at Manistee, Michigan, by fire. The value of the goods so lost was \$651.74, for which, and interest of \$45.62, making a total of \$697.36, the jury rendered a verdict for the plaintiffs by direction of the court, and from the judgment thereon this appeal is taken.

The contention of the learned counsel of the appellant is, that the defendant was entitled to show that its route and line as a carrier extended no farther than Manistee, Michigan, and that said goods were safely carried to that point, and deposited in a warehouse, and in a place set apart for the use of the captain and proprietor of a boat called Adriene, which plied between Manistee and Onekama, who receipted for the goods, and was in the act of removing them, and had removed a part onto his boat, when the warehouse was totally destroyed by fire, and the goods not then removed were destroyed or injured without negligence of the defendant; and that the defendant was entitled to show further that Roundy, Peckham & Co. well understood that the custom was between the defendant’s line and such connecting carrier that such connecting carrier had nothing to do with the defendant’s line, and the circumstances connected with the giving of the receipt, and that the agent, Pawlett, had no authority to make a through bill of lading between Milwaukee and Onekama. This evidence was ruled out by the court, and proper exceptions taken. The admissibility of this evidence depends upon the legal character of the receipt as being a full and perfect contract to carry the goods through the entire route, or otherwise. If the receipt constitutes a through bill of lading of the goods from Milwaukee to Onekama, then it could not be contended that any parol evidence could be given to explain or vary it, and what is established by contract cannot be changed or affected by custom. The general usage of a railroad company in respect

to forwarding goods marked for points beyond its terminus will be deemed to enter into its contract of transportation: *Hooper v. Chicago & N. W. R'y Co.*, 27 Wis. 81, 9 Am. Rep. 439; *Wood v. Milwaukee & St. Paul R'y Co.*, 27 Wis. 541, 9 Am. Rep. 465. Nor could it be contended that the express authority of the agent must be proved when he acted as such in the proper place for receiving goods for the company, and was in possession of the company's stamp to be used on such receipts, and the company took possession of the goods and caused them to be shipped with knowledge of the receipt, which it must be presumed the company had before they were so shipped. No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing that he had authority: *Kasson v. Noltner*, 43 Wis. 646.

The sole question, therefore, is, Does the receipt import a full and complete contract to carry the goods to their destination, or such a contract that it was fully performed by a delivery of the goods to the connecting carrier? I cannot well see how a receipt or bill of lading could be drawn to make a through-contract if this receipt does not. It has all the usual terms. The destination, and the consignees at that place are named. The goods are "shipped" by Roundy, Peckham & Co., "in good order, to be delivered in like good order, as addressed, without unnecessary delay." The address is "Hansen & Kirsh, Onekama, Mich.," as the consignees. Outside of the stamp upon it, it is more like a shipping bill or a bill of lading than a mere receipt. The goods are not received, but shipped by Roundy, Peckham & Co. The stamp is marked "Rec'd. Nov. 2, 1887, by agent, P., Milwaukee." All the apt words to make a perfect, through-contract are used, and none omitted. Manistee, as the destination, is not mentioned, nor is it found in the contract anywhere, for any purpose, nor is it known from the receipt or contract, that there was any connecting carrier on the route, or if so, what one, by water, from Manistee. The respondents took no responsibility of carriage beyond Manistee, but the company assumed it and contracted for it. Even within the rule contended for by the learned counsel of the appellant,—which is claimed to be the general rule by the authorities,—"that where a carrier receives goods for transportation beyond his own line he is not responsible for any loss occurring beyond his line, unless there is a special contract or some usage of business which shows that such carrier takes the goods for the whole route," the defendant was bound to carry the goods the whole route; for there was a special contract to that effect, as we have seen. In *Wahl v. Holt*, 26 Wis. 703, the bill of

lading, or "shipping-receipt," as it is called in the opinion, had the same apt words: "To be delivered in good order and condition as when received, as addressed on the margin, or to his or their consignees." On the margin was: "Account C. Wahl, George F. Wilson, Providence, R. I." But the receipt in that case had also, "Care A. T. Co., Buffalo," and, "By the Commercial Line of Propellers from Milwaukee to Buffalo." These words were held to mean only that the line of propellers by which the goods were shipped ran "from Milwaukee to Buffalo," and "were not intended to define the points between which the commercial line had undertaken to transport the goods"; and it was held that the proprietor of the Commercial Line contracted to carry the goods to Providence, Rhode Island. In that case, as in this, there was mixed land and water transportation by connecting lines. The shipping-receipt or bill of lading in the present case is more explicit, definite, and complete, as a through-contract, than that in the above case, and there is no mention of an intermediate point at the termination of the defendant's line to break the continuity between Milwaukee and Onekama. It is very clear that that case rules this, and is sufficient authority for holding that this is a through-contract, without citing other authorities. That case as well as this is readily distinguishable from *Parmelee v. Western Transp. Co.*, 26 Wis. 439, as well as from all other cases in which the end of the route was held to be an intermediate point, or the end of the defendant's line. We think that the court was warranted in directing a verdict for the plaintiffs.

The judgment of the circuit court is affirmed.

CHAPTER XIII.

3. TERMINATION OF THE RELATION.

108. FISK V. NEWTON,

1 Denio (N. Y.) 45; 43 Am. D. 649. 1845.

Action against a common carrier running a line of freight barges on the Hudson for the non-delivery of certain kegs marked for plaintiff, care of H. S. Field, New York. The kegs, according to a usage (which was proved) in case the consignee could not be found, were delivered to storekeepers. They sold them, credited the proceeds to the line of boats, and became insolvent. Judgment for plaintiff was reversed on certiorari by the superior court. Plaintiff then brought error.

By Court, JEWETT, J. It is well settled that, *prima facie*, a common carrier is bound not only safely to convey, but safely to deliver a parcel which he has undertaken to carry, at the place to which it is directed, to the consignee personally: *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297, and the cases there cited. Personal delivery, however, is sometimes dispensed with, in the case of carriers by ships and boats. Notice given to the consignee of the arrival and place of deposit, comes in lieu of personal delivery: 2 Kent's Com. 605, 3d ed. So when goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known and cannot after due efforts be found, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner.

When so delivered, the storehouse-keeper becomes the bailee and agent of the owner in respect to such goods. In this case, the wharf was the place of delivery, and H. S. Field, the person to whom, from the directions of the plaintiff, the goods were to be delivered. Field was unknown to the carrier. He did not call at the place of delivery for the goods. The consignor had omitted to inform the defendant of the particular residence of Field, or of his occupation or place of business. He was a mere clerk, having no place of business, his name not

in the city directory, and was not discovered by the carrier although reasonable efforts were made to find him. The consignor had misinformed Field as to the line by which the goods had been sent, and the person to whose care they were directed to be delivered; by reason of which Field did not receive the goods. The defendant put the goods in store with a responsible third person, for and on account of the owner, according to the usage of the trade at that place under such circumstances. Then the goods are lost, through the insolvency of the storehouse-keeper, occurring several months after the delivery. I think the risk of the carrier, from the facts in the case, ceased on the delivery of the goods in store, and that the plaintiff failed in his action.

The judgment of the superior court must therefore be affirmed.

109. AMERICAN EXPRESS CO. V. HOCKETT,

30 Ind. 250; 95 Am. D. 691. 1868.

By Court, ELLIOTT, J. Hockett sued the American Express Company to recover the value of a package containing one hundred dollars in currency, received by the company at Chillicothe, Missouri, to be carried and delivered to Hockett at Andersontown, Indiana, which the company failed to do.

An answer was filed, to which a demurrer was sustained, and the company excepted. On a refusal of the company to answer further, judgment was rendered for Hockett. The company appeals. The ruling of the court on the demurrer to the answer presents the only question in the case.

The answer alleges "that the package of money mentioned in the complaint was duly received at the office of the defendant in Anderson, Madison County, Indiana. The defendant, upon inquiry, could not find the residence of said plaintiff to be in said town of Anderson, or in the vicinity; and being ignorant of the real place of residence or postoffice address of said plaintiff, the said defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of the arrival of said package of one hundred dollars at the said office of said defendant, and that the same was ready for delivery, and then and there inclosed the said notice in an envelope, indorsed 'Jonathan Hockett, Anderson, Indiana,' and then and there duly stamped the same, and when so directed and stamped, dropped the same into the postoffice at Anderson; and then and there

placed said package of money in a safe owned by the defendant, wherein said defendant placed and kept all money packages arriving by express for parties, and then and there safely locked the same; said package remaining in said safe thus securely locked up for several days, no one calling for the same until after said package had been stolen by thieves and burglars, who in the night-time violently broke into the office of said defendant where said safe was situate, and without the knowledge of said defendant, broke open said safe, and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant," etc.

Express companies in this state are declared by statute (1 G. & H. 327) to be "common carriers, and subject to all the liabilities to which common carriers are subject according to law." As a general rule, common carriers by land are bound to deliver the goods to the consignee at his residence or place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. Nor is it sufficient that they are left at the public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission: 1 Parsons on Contracts, 3d ed., 660. Goods carried by railroad companies form such an exception: *Bansemer v. Toledo etc. R. R. Co.*, 25 Ind. 434, 87 Am. Dec. 367. But if the consignee is absent, and the carrier after diligent inquiry cannot find him, or ascertain the place of his residence or business, then the liability as carrier is deemed at an end; but it is the duty of the carrier to take care of the goods, by holding them himself, or depositing them with some suitable person for the consignee, and in such case the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence.

The answer in this case alleges that the defendant, "upon inquiry," could not find the residence of the consignee to be in the town of Anderson, or in the vicinity, and being ignorant of his real place of residence or postoffice address, etc. The inference from the answer is, that the inquiry, whatever it was, was made of some one at defendant's office, for it seems that immediately after the arrival of the package, the inquiry was made, the package deposited in the safe, and the notice prepared to be dropped in the postoffice. But if not made there, where and of whom was it made? Did the agent of the company who made it content himself with asking the first person he met, whether resident or stranger, or did he make the inquiry of several? or in other words, did he make diligent and careful inquiry to ascertain the residence of the consignee? The law

required this to be done, but the answer does not aver that it was done. Again, the answer does not aver that the plaintiff, or his place of business, if any, could not easily have been found. For aught that appears in the answer, the consignee may have had an office or place of business in Anderson, where he could readily have been found.

Nor does the answer show that reasonable care was taken of the package. It alleges that it was deposited in a safe in the company's office, in which other money packages received by the company were deposited, and the safe securely locked, where it remained until the office and safe were broken open by burglars and the package stolen, without the knowledge of the company. What was the character of the office building? Was it so constructed and guarded as to make it a reasonably safe place in which to leave money packages unguarded? The answer is silent in this respect; and we cannot infer that it was an appropriate or safe building for such a purpose. Nor does it appear that the safe in which the money was deposited was such that persons of ordinary prudence would have risked it in such deposits. It is called a safe, yet, for anything shown by the answer, it may have been an insecure wooden box. The building was unguarded, and if, as alleged in the answer, the company was accustomed to leave the money packages received in the course of its business deposited there, it might reasonably be expected that thieves and burglars would closely scrutinize its condition, and common prudence would require that either the building or the safe should be such as would likely resist such an attack; but there is nothing in the answer showing that such was the character of either. So that if the facts alleged in the answer could be deemed sufficient to discharge the appellant from liability as a carrier, still it fails to show that it exercised reasonable care with the package as bailee. It follows that, in any view of the case, the answer is bad, and the demurrer to it was correctly sustained.

The judgment is affirmed, with costs.

110. SCHEU V. BENEDICT,

116 N. Y. 510; 22 N. E. R. 1073; 15 Am. St. R. 426. 1889.

HAIGET, J. This action was brought to recover damages alleged to have been sustained by reason of a cargo of malt becoming damp and wet. The defendants were common carriers of freight upon the Erie Canal and Hudson River, and as such

owned and ran the canal-boat W. W. Beebe. On the sixteenth day of June, 1882, they received from the plaintiff thirteen thousand bushels of Canada barley malt, in good order, to be transported to the city of New York. Thereafter, and on the twenty-ninth day of June, the cargo arrived, and notice was given to the consignees of such arrival, who immediately, and on the same day, commenced to unload the same, taking out two thousand four hundred bushels. At the usual hour the men stopped worked, and did not appear again to continue the unloading of the cargo until the sixth day of July, being the seventh day after breaking bulk. It was then found that the malt had been injured by water, and the consignees refused to receive it.

The bill of lading provided that the consignees should have five week-days, regardless of weather, in which to discharge the cargo without liability for demurrage. In discharging the cargo the malt had to be shoveled into bags and taken and carted away.

Upon the trial, questions arose as to whether the grain was received in good order, and as to whether it was damaged upon the voyage or after it arrived in New York, all of which we must regard as settled by the verdict of the jury.

In submitting the case, the court was requested by the defendant to charge that "if the jury should find that the carriers offered to deliver the cargo after its arrival in New York, and, receiving instructions as to its disposal, proceeded in pursuance thereof to a place designated, and commenced to discharge the cargo, then the mere liability as common carrier ceased after a reasonable time had elapsed to unload." This request was refused under the circumstances of the case, and an exception was taken. The court had instructed the jury that the consignees were entitled to a reasonable time in which to discharge the cargo, and that the jury were the judges as to what was a reasonable time, which must be determined under all of the circumstances of the case; that the defendants were responsible for the cargo until it was delivered in some form or another; that the mere putting of it at the disposal of the plaintiff's agent to take out the cargo did not relieve the defendants of their responsibility to take care of it while it lay in the harbor of New York, and was not yet taken out of the boat, and until it was removed either by the plaintiff or defendants they were liable for the proper condition of the cargo; and that if it was damaged by rain whilst lying in New York, the defendants were liable. Exceptions were taken to these charges, and also to the refusal of the court to charge that "after bulk had been broken and part of it removed, and after a reasonable

time had then elapsed to unload or remove the remainder of the cargo, the liability of the carrier, as such, ceased." It does not appear to us that these charges, when read and considered together, present any ground for error which calls for a reversal of the judgment.

The rule, doubtless, is, that the common carrier of freight by boat must, in order to relieve himself from liability, deliver the goods at the place designated in good condition. Undoubtedly there may be a constructive delivery which would terminate his responsibility as a carrier, but it must be such as would in law be recognized as a delivery. If the consignee neglect to accept or to receive the goods, the carrier is not thereby justified in abandoning them or in negligently exposing them to injury. If they are not accepted and received when notice is given of their arrival, he may relieve himself from responsibility by placing the goods in a warehouse for and on account of the consignee, but so long as he has the custody a duty devolves upon him to take care of the property and preserve it from injury: *Tarbell v. Royal Ex. Shipping Co.*, 110 N. Y. 170-182, 17 N. E. R. 721, 6 Am. St. R. 350; *Hathorn v. Ely*, 28 N. Y. 78; *Fisk v. Newton*, 1 Denio (N. Y.) 45, 43 Am. Dec. 649; *Price v. Powell*, 3 N. Y. 322; *Fenner v. Buffalo etc. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

As to whether or not the consignees proceeded with reasonable diligence to unload the cargo was, as the trial court stated, a question, under the circumstances of the case, for the jury. In order to remove the malt from the boat, it had to be bagged and carted away. Whether this could be done with safety, in a rainy day, was a question of fact. It appears that Sunday and one holiday had intervened, and that one or two days had been rainy, so that we think a finding that the consignees had not unreasonably delayed the unloading of the boat is justified by the evidence. On the sixth day of July, as we have seen, the cargo was found so damp as to cause it to be rejected by the inspector of the parties. The consignees had the right to have the malt inspected as it was taken from the boat before accepting it. The entire cargo could not well be inspected at the same time, for that which was on top may have been dry and in good order, whilst that in the bottom of the boat might have been wet and spoiled. The inspector stood by and examined it as it was taken from the boat, and it was only such as passed his inspection that was accepted by the consignees. That which remained in the boat at the close of work on the twenty-ninth day of June remained in the custody and possession of the defendants, whose duty it was to exercise ordinary

§§ 110, 111 TERMINATION OF CARRIER'S RELATION.

care to preserve and protect it from injury, and to allow the consignees a reasonable time within which to inspect it and take it away, and in case they neglected to receive or take it within such time, then it was the duty of the defendants to discharge it in store or warehouse where it would still be protected from the elements.

It consequently appears to us that the defendants have no ground of complaint as to the charges made, and that the judgment should be affirmed, with costs.

111. ZINN V. NEW JERSEY STEAMBOAT CO.,

49 N. Y. 442; 10 Am. R. 402. 1872.

Action for damages for neglect of defendant to make delivery or give notice of arrival of merchandise. The boxes were shipped from Augusta, Michigan, October 15, 1866, were delivered to defendants at Albany October 27, arrived in New York October 28, and were stored with public warehousemen October 30. Plaintiffs first learned of their arrival February 16, 1867, and received them April 15 following. The goods had constantly depreciated in value. Judgment for plaintiffs.

ALLEN, J. Common carriers assume not only the safe carriage and delivery of property to the consignee, but also that merchandise and other property received by them for transportation shall be carried to the place of destination and delivered with reasonable dispatch; and for any unreasonable delay, either in the transportation or its delivery after its arrival at the terminus of the route, they are responsible. *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. D. 54; *Raphael v. Pickford*, 6 Scott N. R. 478; *Blackstock v. N. Y. & E. R. R. Co.*, 20 N. Y. 48, 75 Am. D. 372; *Black v. Baxendale*, 1 Exch. 410. The liability of the carrier to answer for the non-delivery of goods, or the want of reasonable expedition in their delivery, after their arrival at the place of their destination, was not controverted upon the trial.

The defendant in this action was not bound to deliver the merchandise to the consignees at their place of business. A delivery or offer to deliver at the wharf would have discharged the carrier from all responsibility as such carrier. Carriers by water or railroad are not held to a delivery of goods to the consignees at any place other than at the wharf of the vessel or the railroad station, and a notice to the consignee of the arrival of the

goods, and of a readiness to deliver, comes in place of a personal delivery, so far as to release the carrier from the extraordinary and stringent liability incident to that class of bailees. *Gibson v. Culver*, 17 Wend. (N. Y.) 305, 31 Am. D. 297; *Fisk v. Newton*, 1 Denio (N. Y.) 45, 43 Am. D. 649; *Fenner v. Buffalo & St. L. R. R. Co.*, 44 N. Y. 505, 4 Am. R. 709.

If the consignee is present the goods may be tendered or delivered to him personally, and he is bound to remove them within a reasonable time. If he is not present he is entitled to reasonable notice from the carrier of their arrival, and a fair opportunity to take care of and remove them. If the consignee is unknown to the carrier, the latter must use proper and reasonable diligence to find him; and if, after the exercise of such diligence, the consignee cannot be found, the goods may be stored in a proper place, and the carrier will have performed his whole duty, and will be discharged from liability as a carrier. But for want of diligence in finding the consignee and giving notice of the arrival of the goods, the carrier is liable for the damages resulting from a delay in the receipt of the goods by the consignee, occasioned by such want of diligence. He can only relieve himself from liability by storing the goods, after, by the use of reasonable diligence, he is unable to find the consignee. *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. R. 23. A common carrier has not performed his contract as carrier until he has delivered or offered to deliver the goods to the owner, or done what the law esteems equivalent to a delivery. *Smith v. Nashua & Lowell R. R.*, 7 Foster (27 N. H.) 86, 59 Am. D. 364; *Price v. Powell*, 3 N. Y. 322. When the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right to warehouse the goods, and, as notice to the consignee takes the place of a personal delivery of the goods, and as a due and unsuccessful effort to find the consignee will alone excuse the want of such notice, it follows that if a reasonable and diligent effort is not made to find the consignee, the carrier is liable for the consequence of the neglect. What is a due, a reasonable effort, and what is proper and reasonable diligence, depends necessarily very much upon the circumstances of each case, and, in the nature of things, is a question of fact for the jury, and not of law for the court. What would be reasonably sufficient in one place might be entirely inadequate and insufficient in another, and the extent and character of the inquiries to be made, in the exercise of a reasonable diligence on the part of the carrier, cannot be regulated or prescribed by any fixed standard, as the standard must shift with the varying circumstances of each case. The law cannot and does not define the

measure of duty, making it the same in all cases and under all circumstances, in cases like the present; and, therefore, the question whether the defendant did use proper and reasonable diligence to find the consignee was properly submitted to the jury. *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. R. 23; *West Chester and Phila. Railroad Co. v. McElwee*, 67 Penn. St. 311; *Hill v. Humphreys*, 5 Watts. & Serg. (Pa.) 123, 39 Am. D. 117.

The motion for a non-suit at the close of the plaintiff's case was properly denied. It had then been proved that the goods had been brought to New York by the defendant as a common carrier, and been put in store; that the plaintiffs, the consignees, had had no notice or knowledge of their arrival or of their storage, and that, between the time of their landing in New York and their receipt by the plaintiffs, they had greatly depreciated in value. No attempt had been made to show notice of the arrival of the goods, or that the consignees were unknown or could not be found.

The doctrine of concurrent negligence has no application to the case. It was several weeks after the landing of the goods from the defendant's steamer on the wharf in New York that the plaintiffs learned or knew of their arrival, in any view of the evidence, and at that time the goods had become, in a measure, unsalable, and their market value was diminished. From the time the plaintiffs had notice of the arrival of the goods and that they were subject to their orders, and a reasonable time had elapsed for their removal, they were at the risk of the plaintiffs, and no liability attached to the defendant for subsequent depreciation in value. The concurrent acts of the plaintiffs and defendant could not contribute to the same injury; their duties were not concurrent, but in succession. The defendant's duty was to give the plaintiffs notice or make due diligence to find them, and until that was done the goods were at its risk; and when the duty was fully performed and the goods put in store, the liability of the carrier ceased, and the risk of loss by depreciation in value was upon the plaintiffs. The duty and liability of the one grew out of the performance of duty by the other.

The defendant gave evidence of all that was done to find the consignees, and the effort made was very slight, and would not have justified the court in ruling, as matter of law, that due and reasonable diligence had been used for that purpose. The inquiries made were casual, and no serious attempt was made to find the consignees or to give them notice of the arrival of the goods. Indeed, on cross-examination, the freight agent of the defendant testified that it was not their custom to give notice

to the people in the city, and doubtless the agents and servants of the company acted under a mistake as to the duty and legal liability of the carrier.

There was no question touching the extraordinary liability of carriers in the case. The claim was not against the defendant as an insurer of the safety of the property, but for want of ordinary and reasonable diligence in the performance of a duty resulting, by implication, from the contract of carriage. The judge, therefore, properly refused to instruct the jury upon the subject of the extraordinary liability of the defendant as a common carrier. As the goods had been shipped from Michigan by railroad, and the plaintiffs had no knowledge that they had been transferred to the defendant at Albany, and were not expecting them by steamboat, there was no occasion for them to be on the look-out for them on the defendant's wharf, or on the arrival of the boats of the company. There was nothing to justify the submission of any question to the jury on this branch of the case. There was no complaint, or reason for complaint, of the manner in which the cause was submitted to the jury, and the verdict is conclusive upon the questions of fact.

The judgment must be affirmed.

All concur, except PECKHAM, J., not sitting, and GROVER, J., not voting.

112. MOSES V. BOSTON AND MAINE RAILROAD CO.,

32 N. H. 523; 64 Am. D. 381. 1854.

Action on the case for the value of ten bags of wool burned in defendant's freight depot in Boston. A public notice, of which plaintiff had knowledge, read: "Articles of freight must be taken away within twenty-four hours after being unladen from the cars, on arriving at their place of destination, the company reserving the right, if they see fit, of charging storage after that lapse of time. The company will not hold themselves responsible, as common carriers, for goods after their arrival at their place of destination, and unloading in the company's warehouse or depot." Five questions were submitted to the jury, by consent. 1. Was the wool carried over the road, and then removed from the cars to the platform of the freight depot in Boston, and separated from the other goods before the fire? 2. Was it so carried and removed from the cars a sufficient time before the fire to enable Townsend & Son to obtain possession of it by the exercise of reasonable diligence on the part of the plaintiff and of Townsend & Son? 3. Did the wool fail of being

delivered to Townsend & Son by reason of the want of ordinary care and prudence of the defendants? 4. Was any portion of the wool sold by the defendants? 5. Did the plaintiff have any knowledge of the printed notice before the wool was sent over the road? They could not agree upon the first, answered "yes" to the third and "no" to the others. Verdict for plaintiff.

By Court, SAWYER, J. (After stating the facts.) The position taken at the trial, that the defendants had limited their liability as common carriers to the time when the wool was taken into the depot by a public notice to that effect, would not have availed the defendants if the finding of the jury upon the fifth question had established the fact that the notice was brought to the knowledge of the plaintiff before the wool was sent. In the case of *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71, 55 Am. Dec. 222, it was expressly decided that a public notice to the effect that the railroad company would not be responsible for loss or injury to goods in their hands as carriers, except such as might arise from negligence, would not have the effect thus to limit their common-law liability, even when brought home to the knowledge of the owner. This renders it unnecessary to consider any question arising upon the character of the instructions given upon the fifth question; and the only remaining point in the case, considered as an action against the defendants as carriers, upon the original count and the second and fourth amended counts, is that involved in the second question, raising the principal inquiry in the case, when does the liability of a railroad company as carriers of goods terminate?

The wool in this case was received and conveyed by the defendants in their ordinary employment as common carriers. It was not of a value disproportionate to its bulk, and was such that no deception could have been practiced upon them as to the extent of the risk they incurred. In the transportation of such commodities their responsibility as carriers commences with the receipt of the goods, though not put by them immediately on the transit, and it ceases only when they have reached their destination and their control over them as carriers has terminated. That control must continue until delivery, or a tender or offer to deliver, or some other act which the law can regard as equivalent to a delivery. The delivery of goods conveyed by railroad is necessarily confined to certain points on the line of the railroad track. Railroad companies cannot, like wagoners, pass from warehouse to warehouse, and there discharge their freight to the various consignees upon their own premises. They con-

sequently establish certain points as places of delivery, and there unlade their cars of such of the freight as may most conveniently find its ultimate destination from those respective points. But while it is in the process of unloading, and afterwards, while awaiting removal, it must be protected from the weather and from depredation. Freight is brought over the road at all hours, by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air. Until the goods have passed out of their custody and control into the hands of the proper person to receive them, they have a duty to perform in the preservation and protection of the property even after their responsibility as common carriers is at an end: *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86, 59 Am. Dec. 364. It thus becomes a matter of necessity for them to provide depots, or warehouses, for the reception of freight at the stations established for its delivery. If the owner or consignee, or other person authorized to receive the goods, is present at the time of the arrival, and has opportunity to see that they have arrived, and to take them away, this may be regarded as equivalent to a delivery. They must be understood after this to remain in the charge of the company, for his convenience, as depositaries or bailees for hire. In such case, the grounds upon which the common-law liability of the carrier is made to rest have so far ceased to exist that there is no longer any just occasion for holding the company to that stringent responsibility in reference to these goods. They are no longer in the course of transportation, beyond the reach of the owner, and under the exclusive control and observation of the carrier. The owner has again got sight of his property, and is in a situation, to some extent, to oversee and protect it. Nor is he any longer under the difficulties and embarrassments in attempting to make proof of subsequent fraud or negligence as when it was on its passage beyond the reach of his observation and under the private control of the carrier. The facilities and temptations to fraud and collusion in the embezzlement or larceny of the goods are also removed, or at least greatly diminished.

It is upon these considerations that the strict liability of the carrier is founded. "It is a politic establishment," says Lord Holt, in *Coggs v. Bernard*, 2 *Ld. Raym.* 918, "contrived by the policy of the law for safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that

they may be safe in their ways of dealings; for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, etc., and yet doing it in such a clandestine way as would not be possible to be discovered."

In Kent's Com. 602, it is said that the rule subjecting the carrier to this strict responsibility is founded on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unraveled. If it were not for the rule, the carrier might contrive, by means not to be detected, to be robbed of his goods in order to share the spoils.

That the danger of loss by such collusion is not now so prominent a consideration as in the semi-barbarous times, when the rule was first adopted, is quite probable. But upon this point it is well said by the court in *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71, 55 Am. Dec. 222, before cited, that the immense increase of this business, the great value of the commodities now necessarily intrusted to the charge of common carriers, and the vast distances to which they are to be transported, have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have added greatly to the opportunities and temptations of the carrier who might be disposed to neglect or violate his trust. The reasons upon which the rule is founded apply in all their force to railroad companies as carriers, and the same considerations of public policy which lead to its adoption continue to require that it be maintained in all its rigor as to them. Any relaxation of the rule must be attended only with mischief. Many of the most eminent English judges, prior to the acts of 2 Geo. IV. and 1 Wm. IV., expressed regret that their courts had sanctioned the doctrine that the carrier had the right to limit his liability by a public notice, and predicted the necessity for the legislative interference which resulted in those acts restoring the strict responsibility of the ancient rule, in order to remedy the mischiefs which that relaxation had introduced. *Moses v. Boston etc. R. R. Co.*, *supra*.

The inquiry then is, At what moment after the goods conveyed by a railroad company in their cars have reached the point on the line of the railroad where they are to be delivered may the reasons upon which the common-law liability of the carrier is founded be said to cease, when there is no person present at their arrival authorized to receive them, and ready to take them away?

That it is the duty of the consignee to come for them is clear, but it would be quite as impracticable for him to be at the

place of delivery at the precise moment of their arrival, or of their being unladen from the cars, without actual notice to him of their arrival, as it would be for the company to diverge from their line of road in order to deliver them at his place of business, or to send notice to him of their arrival, before proceeding to unload them. The arrival may be in the night, or after the expiration of business hours at the station, or at so late a period before it as to render it impossible for him to get them away within the hours of business. If, under such circumstances, they have been removed from the cars and placed in the warehouse, it cannot be said that they are so placed and kept there until the gates are opened, and business resumed upon the following day, for any purpose having reference to the convenience and accommodation of the owner or consignee, nor can the proceeding, upon any sound view, be considered as equivalent to a delivery. The same persons—the servants of the company—continue in the exclusive possession and control of the goods as when they were on their transit,, and they are equally shut up from the observation and oversight of all others. The consignee has had no opportunity to know that they have arrived, and in what condition, and is in no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed, or damaged by their fraud or neglect subsequently to their removal, and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually *in transitu*—the declarations of the servants of the company, they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods, and for other fraudulent or collusive practices, must continue to be equally tempting after their removal, under such circumstances, as before. The risk of detection, in some respects, may be made even less than before, by the greater facilities which the servant of the company in charge of the warehouse has of manufacturing evidence of a burglary, or creating proof of the destruction of the goods by fire, set by himself for the purpose of concealing his agency in their larceny. For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them any over-

sight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest have equal application after the goods are removed into the warehouse as before, until the owner or consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk.

It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers to themselves as warehousemen. The question still is, When, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made? If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession, under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment, for the reason that he may not be disposed to intrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be delivered at the arrival of the train, at whatever hour that may happen to be, whether in the night or the day, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend. It is to be supposed that the consignee has been advised by the

consignor of the fact that the goods have been forwarded, and that he has taken, or is prepared to take, proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the hours established for the arrival of the trains, and in unlading the cars, and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as but for those peculiar circumstances would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.

In the case now under consideration there was conflicting evidence as to the time when the train by which the wool was carried arrived at the depot in Boston. The evidence on the part of the defense tended to show that it arrived at the usual time—between one and two o'clock in the afternoon; while that of the plaintiff tended to show that it did not arrive until three o'clock. The gates of the depot were closed at five, and from two to three hours were usually required for unloading the cars. Upon the view of the evidence most favorable to the defendants, there was but a period of from three to four hours at the longest for the consignee to have come and taken away the wool, before the gates were closed; and it was destroyed before they were reopened for the purpose of delivering out the goods. This view proceeds upon the supposition that the work of unlading the cars was commenced immediately upon their arrival; and in the process of unloading, ordinarily occupying from two to three hours, the wool happened to be the first article taken from the cars, and was at once ready for delivery. Upon a view less favorable to the defendants, the jury might have found, upon the evidence in the case, that the train arrived at three, and that the wool was unloaded at six—one hour after the closing of the gates. That the verdict, in answer to the second

question submitted to the jury, was therefore warranted by the evidence is quite clear; and as there are no legal exceptions to the proceedings upon the trial, so far as they relate to this point, the answer of the jury to that question establishes the fact that the consignees had no reasonable opportunity, after the wool was taken from the cars, to come and inspect it so far as to see whether from its outward appearance it corresponded with the letter of advice from their consignor and to remove it before it was destroyed. This fact being established, upon the views of the law entertained by the court the transit had not terminated, and the defendants continued liable for the wool as carriers down to and at the time of the loss; and the general verdict entered for the plaintiff may well be sustained upon the original and the second and fourth amended counts.

We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the supreme court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of *Norway Plains Co. v. Boston etc. R. R. Co.*, 1 Gray, 263, 61 Am. Dec. 423. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot ready for delivery, whether it be done in the day time or in the night, in or out of the usual business hours, and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class of carriers of a plain, precise, and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes.

It is unnecessary, then, to consider the exceptions taken upon the other view of the case, as an action against the defendants for negligence in their care of the wool after their liability as carriers had ceased.

Judgment upon the verdict.

PERLEY, C. J., did not sit.

See also *Norway Plains Co. v. Boston and Maine Railroad Co.*, § 113, and *McMillan v. M. S. & N. J. Railroad Co.*, § 114.

113. NORWAY PLAINS CO. V. BOSTON AND MAINE
RAILROAD CO.,

1 *Gray (Mass.)* 263; 61 *Am. D.* 423. 1854.

Action for goods destroyed by fire in the freight depot of defendant railroad company.

By Court, SHAW, C. J. The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal-boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law by which the rights and obligations of owners, consignees, and of the carriers themselves are to be governed is old and well established. It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited, and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience, which is public policy—although these general considerations would be too vague and uncertain for practical purposes in the various and complicated cases of daily occurrence, in the business of an active community—yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judi-

cial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted by the same considerations to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, New Hampshire, the one October 31, 1850, and the other November 2, 1850.

By the facts agreed, it appears that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday, the second of November, and were then taken from the cars and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery a least as early as Monday morning, the fourth of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the fourth of November; the cars arrived late; Ames, the truckman, knew from inspection of the way-bill that the goods were on the train, and waited for them some

time, but could not conveniently receive them that afternoon in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year the doors were closed. In the course of the night the depot accidentally took fire and was burned down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse, suitably inclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses used for storage of merchandise; that it is furnished with tracks on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is, whether under these circumstances the defendants are liable. That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can be only justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is to ascertain the precise limits of their liability. This was done to a certain extent in this court in a recent case, with which, as far as it goes, we are entirely satisfied: *Thomas v. Boston & Providence R. R.*, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or a public enemy. It is not necessary now to inquire into the weight of those consid-

erations of reason and policy on which the rule is founded; nor to consider what casualty may be held to result from an act of God or a public enemy; because the present case does not turn on any such distinction. It is sufficient, therefore; to state and affirm the general rule. In the present case, the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the company, though the goods remained in their custody. If at the time of the loss they were liable as common carriers, they must abide by the loss; because, as common carriers, they were bound as insurers to take the risk of fire not caused by the act of God, and in such case no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable could amount to no defense, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended in the present case that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery. This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it can not apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in *Hyde v. Trent & Mersey Navigation*, 5 T. R. 397: "A ship trading from one port to another has not the means of carrying the goods on land; and according to the established course of trade, a deliv-

ery on the usual wharf is such a delivery as will discharge the carrier.”

Another peculiarity of transportation by railroad is, that the car can not leave the track or line of rails on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course it is essential to the accommodation and convenience of all persons interested that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of the opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both the services, as well the absolute undertaking for the carriage as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers

for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the fact; or, in analogy to the old rule, that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed, the same doctrine is distinctly laid down in *Thomas v. Boston & Providence R. R.*, 10 Met. (Mass.) 472, 43 Am. D. 444, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of *Garside v. Trent & Mersey Navigation*, 4 T. R. 581, and *Hyde v. Trent & Mersey Navigation*, 5 Id. 389. See also *Van Santvoord v. St. John*, 6 Hill. 157; *McHenry v. Philadelphia, Wilmington & Baltimore R. R.*, 4 Harr. (Del.) 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle thus adopted is not new; many cases might be cited: one or two will be sufficient. Where a consignee of goods, sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon-office or warehouse of the common carrier, it was held that the transit was at an end when the goods were received and placed in the warehouse: *Rowe v. Pickford*, 8 Taunt. 83. Though this was a case of stoppage *in transitu*, it decides the principle. But another case in the same volume is more in point: *In re*

Webb, Id. 443. Common carriers agreed to carry wool from London to Frome under a stipulation that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse until the consignor was ready to receive it. Wool thus carried, and placed in the carriers' warehouse, was destroyed by an accidental fire; it was held that the carriers were not liable. The court say that this was a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they can not then be delivered; or if, for any reason, the consignee is not there ready to receive them—it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case that the railroad company are responsible as common carriers of goods until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods at the larger places to which goods are thus sent are so numerous, frequent, and various in kind that it would be nearly impossible to send special notice to each consignee of each parcel of goods or single article forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable that persons frequently forwarding goods have a general

agent, who is permitted to inspect the way-bills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice for persons forwarding goods to give notice by letter, and inclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *prima facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiff's authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars and placed in the depot before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity

of the case and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars; so that goods may arrive and be unladen at an unsuitable hour in the night to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties and the nature of the carriers' duty to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule that delivery from the cars into the depot terminates the transit. If therefore, for any cause the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses at which he was to deliver them; that is, not early enough to suit his convenience. But for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.

Judgment for the defendants.

114. M'MILLAN V. MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD CO.,

16 Mich. 79; 93 Am. D. 208. 1867.

By Court, COOLEY, J. (After deciding that defendant railroad was subject to the general railroad law of the state by which it was not permitted to abridge its common-law liability as common carrier.) What that liability is, when they have transported property over their road and deposited it in their warehouse to await delivery to the consignee, is the next question demanding consideration.

On this point, three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts.

1. That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the Massachusetts cases: *Thomas v. Boston etc. R. R. Co.*, 10 Met. (Mass.) 472,

43 Am. D. 444, and *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray (Mass.) 263, 61 Am. D. 423, and those which follow them.

2. That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business: *Morris and Essex R. R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. D. 215; *Blumenthal v. Brainerd*, 38 Vt. 413, 91 Am. D. 350; *Moses v. Boston and Maine R. R. Co.*, 32 N. H. 523, 69 Am. D. 381; *Wood v. Crocker*, 18 Wis. 345, 86 Am. D. 773; *Redfield on Railways*, 3d ed., sec. 157.

3. That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time in the common course of business to take them away after such notification: *McDonald v. Western R. R. Corp.*, 34 N. Y. 497, and cases cited; 2 *Parsons on Contracts*, 5th ed., 189; *Angell on Carriers*, sec. 313; *Chitty on Carriers*, 90.

The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand ready to take it away when received. It is assumed to be simply a question of reasonable diligence with the consignee whether he ascertains the receipt of his consignment or not; the regularity of the trains being such as to leave him without reasonable excuse, if he fails to inform himself.

There may be railroad lines in the country where the application of this rule would do injustice to no one. If the business is not so great but that freight trains can be run with the same regularity as those for passengers, and the freight can always be sent forward immediately on being received for the purpose, a notice from the consignor will usually apprise the consignee with sufficient certainty when the goods may be expected. But on the long through lines such regularity is quite impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or in other words, as it may suit his convenience and his interest to forward it. This may be many days, or even weeks, after its receipt, or it may be immediately. It is not always in the power of the carrier to give reliable

information upon the subject, and unavoidable delays will frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is an almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who therefore never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare *Scholes v. Ackerland*, 13 Ill. 650, and *Crawford v. Clark*, 15 Id. 561, with *Richards v. Michigan etc. R. R. Co.*, 20 Id. 404, and *Porter v. C. & N. W. R. R. Co.*, 20 Id. 407. See also *Chicago etc. R. R. Co. v. Warren*, 16 Ill. 502, 63 Am. D. 317, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad,

and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms upon considerations springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the incidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can claim any exemption from the liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and to facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods, or if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it cannot possibly be either properly, expeditiously, or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest, and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce it would be impossible to transact the amount of business now done if the cars must stand upon the track until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the

interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquestionably liable as carriers from the time of their receipt. In every view, therefore, they seem indispensable to the business of the carrier; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard, and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a warehouseman against the will of the owner of the property, on the ground solely that he had erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. It is a rule which allows the insurer to absolve himself from obligations to the insured, by supplying him with conveniences for the transaction of his business, and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled, the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If by understanding with

the consignee the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding, sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties, and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them.

Whether the clause in the general railroad law forbidding companies formed under it from lessening or abridging their common-law liability as carriers prevents their entering into contracts by which their employers release them from any of their liability, is not clear upon the terms of the clause itself. Such contracts are not expressly forbidden, and the general tendency of legislation in modern times has been to relax, rather than to render more severe, the strict rules of the common law in regard to carriers, of which our own state presents an example in the legislative exemption of the principal companies from liability as carriers for goods in their warehouses awaiting delivery. And a clause which should forbid parties from entering into any such agreements with carriers as they might conceive to be for their interest would hardly be looked for in the general law, unless strong reasons were known to have existed for its adoption.

When that law was passed, a controversy had been going on between common carriers and the public in respect to the notices given by the former by public advertisement and otherwise, by which they sought to relieve themselves from some portion of their common-law liability, whether those employing them assented or not. The courts in this country had generally held these notices ineffectual; but they still continued to be given, and to be insisted upon as possessing legal force. I do not perceive in the clause in question any intention to go further than to put an end by the fundamental law of these organizations to any further controversy upon that ground. In view of the extent to which the courts had gone in England in giving force to such notices, no one can say that the precaution was needless. The companies are forbidden to lessen or in any way abridge their liabilities as common carriers, but the person sending goods by them is not forbidden to release

them from such liabilities, or from any portion thereof, for any consideration which to him is satisfactory. In other words, the law compels these companies at all times, at the option of those sending goods by them, to carry the goods as insurers. If, on the other hand, the carriers can make it for the interest of the party to relieve them from this liability wholly or in part, a contract to that effect, if fairly made, and embracing no unreasonable conditions, is not opposed to public policy, and to forbid it would seem an unnecessary restraint upon freedom of action: See *Bissell v. New York Cent. R. R. Co.*, 25 N. Y. 448, 82 Am. D. 369. The distinction between a restriction by the carrier himself and a contract by which another party releases him from obligations was pointed out by this court in *Michigan Cent. R. R. v. Hale*, 6 Mich. 243, and is the same which is applicable here. Many things are transported by railroad in respect to which it may be for the mutual interest of both parties that special contracts be made. Live stock are usually accompanied and cared for by the owner or his agent under special agreements, and in some other cases the owner prefers to assume such general oversight and control as is inconsistent with the full common-law liability of the carrier. It has not been generally supposed that the clause under consideration forbade special contracts in such cases, and the legislature of 1867 must have considered them lawful when they provided that all contracts modifying the common-law liability of railroad companies as carriers should be wholly in writing: *Laws 1867*, p. 165. This enactment was evidently designed, not to enlarge the powers of railroad companies, but to impose restraints upon an existing authority to make contracts.

A much more difficult question is, what shall constitute the proof of a contract, in the absence of distinct evidence that the parties have consulted and agreed upon terms. The practical difficulty, amounting almost to an impossibility, of bringing the carrier and his employer together on every occasion for the discussion of terms, has led to the adoption by carriers of a printed form of contract, which is put into the hands of the consignor, and by its terms purports to bind him to its conditions; but it is strongly insisted that there ought to be more satisfactory evidence of assent on the part of the consignor to modify any of his common-law rights than is derived from the mere receipt of a paper from the carrier, framed to suit the interest of the latter, and which the consignor may never have read.

There are some matters in respect to which the carrier may

qualify his liability by mere notice. Mr. Greenleaf says: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly": 2 Greenl. Ev., sec. 235; see *Western Transportation Co. v. Newhall*, 24 Ill. 466, 76 Am. D. 760. These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery: *Farmers' and Mechanics' Bank v. Champlain Trans. Co.*, 16 Vt. 52, 42 Am. D. 491; 18 Vt. 131; 23 Id. 186, 56 Am. D. 68. But beyond the establishment of such rules, the force of a mere notice cannot extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability. "A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment": *Pierce on Railroads*, 416; see *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. D. 470; *Jones v. Voorhees*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. H. 487; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382; *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71, 55 Am. D. 222; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 256, 62 Am. D. 576; *Slocum v. Fairchild*, 7 Hill, 292; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. (N. Y.) 136, 11 N. Y. 485, 62 Am. D. 125; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243. The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his lia-

bility, if he claims that one exists: *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382, per Nelson, J.

The evidence of such a contract in the present case consists: 1. Of the defendant's mode of doing business; and 2. Of what are called in the case bills of lading, and which contain the supposed limitations. It is admitted by the plaintiffs that the bills of lading in use by these defendants, and all the contracts of affreightment, the instructions to agents, and the printed rules posted in all the depots and station-houses of defendants for the past ten years, have contained clauses exempting them from liability or loss by fire, and providing that when goods are in the depot awaiting delivery to consignees the company will be liable as warehousemen only, and not as carriers; and that plaintiffs have been accustomed to do business with defendants, and to receive and send goods over their road under bills of lading of this description.

There are several reasons why knowledge in plaintiffs of defendants' usage to make restrictive contracts cannot control the present case. In the first place, knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode; and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common-law rights thereafter. In the second place, the defendants have no power under the law to establish a usage restricting their liability, as that would come directly in conflict with the clause in the general railroad law heretofore quoted. And in the third place, if this were otherwise, the usage would be irrelevant to the present case, since the proof relates to dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs there, while the contracts here in question were in each instance made with consignors at a distance, and in most cases by other railroad companies, whose usages do not seem to be uniform.

It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation, and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper to be conveyed on the terms therein expressed to their destination and there delivered to the parties therein

designated: Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation; and is the measure of their rights and liabilities, unless where fraud or mistake can be shown: Redfield on Railways, 307-309, and notes; Angell on Carriers, sec. 223. It has acquired from usage a negotiable character, and the carrier may be estopped as against the indorsee for value from showing mistakes in giving it: Redfield on Railways, 307. Whether the contracts which railroad companies are accustomed to give on the receipt of goods for transportation, and which are usually called by the same name, are subject to all the same incidents as the bills of lading proper, we need not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, I think, the weight of authority, and certainly the rule in this state, that the carrier may stipulate in them for a limitation of his common-law liability: *Michigan Central R. R. Co. v. Hale*, 6 Mich. 243.

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one: *Brown v. Eastern R. R. Co.*, 11 Cush. 97; and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else,—as, for instance, a mere receipt for money,—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such: *King v. Woodbridge*, 34 Vt. 565. But except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not. The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms,—taking whatever the railroad companies see fit to give them; and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or, if we may be allowed to state the same thing in different words, as everybody is negligent in these matters, and will not give the necessary attention

to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the outset, whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties, though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident, or mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties *compotes mentes* in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight, or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freights in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it. An exemption from liability from losses arising from specified causes, when embodied in the bill of lading, has been frequently recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice: *Davidson v. Graham*, 2 Ohio St. 131; *Parsons*

v. Monteath, 13 Barb. 353; York Co. v. Central R. R. Co., 3 Wall. 107; Dorr v. New Jersey Steam Navigation Co., 11 N. Y. 491, 62 Am. D. 125; and in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in Moore v. Evans, 14 Barb. 524; Kallman v. United States Express Co., 3 Kan. 205, and Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. D. 128; and it is in accordance with the general rule applicable to written contracts.

It is said, however, that these special contracts must be held void for want of consideration unless it is shown that, in return for the release of the carrier from his extraordinary liability, he on his part has made a deduction in the rates of freight. What does appear in the present case is, that the carrier, in consideration of the promise by the consignor to release him from certain liabilities, and to pay him certain moneys, agrees on his part to carry the goods for the sum named. I do not see how we can assume that the charges are the same that they would have been had the release been omitted. If by the charter of a railroad corporation maximum rates had been established, and the corporation had attempted to charge these rates for a restricted liability, a case would be presented coming within the principle of this objection: Bissell v. New York Central R. R. Co., 25 N. Y. 449, 82 Am. D. 369, per Selden, J.; but no such case is before us here, and a consideration appears which, for aught that is shown by the record is sufficient.

It was also said on the argument that a rule such as we have now laid down would place the public at the mercy of the railroad companies, who would refuse to give any other than restricted bills of lading. It is enough for us to say in this case that railroad companies chartered as common carriers have no such power, and the consignor can assent to the restriction in each instance, or refuse to assent, at his option. If the corporations decline to transport goods as common carriers when that is the condition upon which they hold their franchises, there would be no difficulty, I apprehend, in applying the proper remedy.

It will now be necessary to examine the various bills of lading in reference to the particular limitations which they contain. Two of those given by the Cincinnati, Hamilton and Dayton Railroad Company contain no restrictions; the other excepts against liability for "unavoidable accident and fire in depot." Those issued by the defendants contain, among others,

a similar exception. It is claimed by the plaintiffs that these and similar exceptions will not shield the defendants, because the loss in the present case was the result of the negligence of their officers or servants, against liability for which it was not lawful for them to contract.

Whether the rule that a carrier, on grounds of public policy, is not to be permitted to contract for exemption from liability for his own negligence (*Fairchild v. Slocum*, 19 Wend. 329; *York Company v. Central R. R. Co.*, 3 Wall. 113; 3 *Parsons on Contracts*, 5th ed., 249), can properly be so extended as to prevent corporations contracting against liability for the negligence of their officers or servants, or any classes of them, and if not, then whether the general words of exemption here employed ought to be construed to embrace the negligence of such officers and servants (*Wells v. New Jersey Steam Navigation Co.*, 8 N. Y. 379; *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 179, 5 Am. D. 206; *Alexander v. Greene*, 7 Hill, 533), are questions I do not care to discuss in this case, inasmuch as I think no such negligence is shown.

What was relied upon was the fact that barrels of benzine were carried over the road of defendants, landed in their depot at Detroit, and then passed over to the Detroit and Milwaukee Railroad Company, which occupied the other end of the same warehouse; that some of these barrels were in a leaky condition; and that while being handled by the employees of the latter company the escaping gas took fire from a lantern, and resulted in the destruction of the warehouse and its contents. From this it appears that the fire took place after the inflammable fluid had passed out of the hands of the defendants. The fact that they had carried it over their road had nothing to do with its ignition. If it should be conceded to be negligence in the company to receive so dangerous an article among their freights, yet if no loss resulted while it remained in their custody, it would be difficult to hold them responsible for accidents happening from its subsequent handling. When the Detroit and Milwaukee company received it upon their premises, it was of no consequence from whence it came, and any accident which might result would have no relation to the source from which it was received. It would be as legitimate to hold a merchant responsible from whom it might have been bought as the carrier from whom it had been accepted. If we are to trace causes back, we need not stop at the preceding carrier, but, with similar reason, might hold the man liable who made the leaky barrels, or the person from whom the first carrier received them filled. The law can only look at the proximate

causes of an injury, and not at those remote circumstances that may have contributed to those causes: *Olmsted v. Brown*, 12 Barb. 657; *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. D. 219; *Whatly v. Murrell*, 1 Strob. 389; *Matthews v. Pass*, 19 Ga. 141; *Platt v. Potts*, 13 Ired. (N. C.) 455, 53 Am. D. 412.

Some question was made on the argument whether the consignors can be held, in the absence of explicit evidence on the subject, to have authority to enter into special contracts with the carrier which shall be binding on the consignee. His authority, I think, is to be presumed; and the carrier is under no obligation to inquire into it: *Moriarty v. Harnden*, 1 Daly, 227. It is a question of more difficulty whether the Ohio bills of lading would govern the transportation for the whole route. By their terms the Cincinnati, Hamilton and Dayton Railroad Company acknowledge the receipt of the goods in good order, to be delivered in like good order "at Toledo for Detroit," unto the plaintiffs or their assigns, they paying freight. No evidence is given of any custom that these contracts shall govern the whole distance; nor does the case show whether the rates of freight specified are for the delivery at Toledo or at Detroit. The words employed only import that the goods are to be carried to Toledo, and from thence forwarded; and in the absence of any special custom on the subject, it would seem that the company giving these bills fully discharged their duty when they had delivered the goods to the defendants at Toledo.

There is a number of English cases in which it has been held, where carriers received goods and gave receipt therefor, which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands: *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & W. 421; *Collins v. Bristol etc. R. R. Co.*, 11 Ex. 790; *S. C. in House of Lords*, 5 Hurl. & N. 969. The same ruling has been made in this country, where the carrier had expressly agreed to carry to a point beyond his line, for a compensation specified: *Wilcox v. Parmelee*, 3 Sand. 610; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Noyes v. Rutland etc. R. R. Co.*, 27 Vt. 110. But the doctrine generally accepted by the American courts is, that where a carrier receives goods marked for a particular designation beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line and forward from its terminus: *Ackley v. Kellogg*, 8 Cow. 223; *Van Santvoord v. St. John*, 6 Hill, 157; *Hood v.*

New York etc. R. R. Co., 22 Conn. 1; Elmore v. Naugatuck R. R. Co., 23 Conn. 457, 63 Am. D. 143; Farmers' and M. Bank v. Champlain Trans. Co., 23 Vt. 209, 56 Am. D. 68; Brintnall v. Saratoga R. R. Co., 32 Vt. 665; Nutting v. Connecticut River R. Co., 1 Gray, 502; Briggs v. Boston etc. R. R. Co., 6 Allen (Mass.) 246, 83 Am. D. 626; Perkins v. Portland etc. R. R. Co., 47 Me. 573, 74 Am. D. 507; American note to 11 Exch. 797. And see Angle v. Mississippi etc. R. R. Co., 9 Iowa, 487.

In the case of 1 Gray the defendants receipted the goods at a station on their line "for transportation to New York,"—a point beyond their line. No connection in business was shown between them and any other railroad company. The defendants were accustomed to receive pay only over their own road. The goods in question were delivered to a connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question on the authorities. That circumstance has evidently been regarded as important in some cases: See Weed v. Saratoga etc. R. R. Co., 19 Wend. 537, and Redfield on Railways, 286, and note; but in Hood v. New York etc. R. R. Co., 22 Conn. 1, the first carriers, who received payment for transportation over the connecting line, were regarded as having received it as agent only, and not as compensation for an undertaking by themselves to transport over such line.

In the present case, it is not shown that any connection in business exists between the defendants and the Cincinnati, Hamilton and Dayton Railroad Company. It is admitted that the latter company "is one of those forming a transportation route from Cincinnati to the city of Detroit"; but this would be true whether the companies had business connections or not. It does not appear that the freight was paid, and the contrary is inferable. It does not even appear that the charges agreed upon were for the whole route; and if they were, the case I think would not be affected by that circumstance. The only consequence would be to make the whole freight payable to the defendants, who would deduct their own charges, and pay over to the Ohio company what remained. Fixing upon the price would only amount to an agreement by the Ohio company that the whole charges should not exceed that sum. In the absence of agreement between the two companies on the subject, the defendants would not be compelled to conform their own rates to those agreed upon at Cincinnati.

On this record as it stands, I think we must hold that the bills of lading given at Cincinnati were fully complied with when the Cincinnati, Hamilton and Dayton Company had carried the goods to Toledo, and there delivered them to the defendants. If there is any exception to this statement, it must relate to the rates of freight; but even as to those, the undertaking of the Ohio company would not bind the defendants unless authority to bind them was shown. As there is no evidence on that point, I think the defendants received the goods at Toledo to be carried to Detroit under their liability as carriers at the common law, and with the right to make such reasonable charges as their regulations may have prescribed. If reasonable charges over their own line would exceed the amount specified,—and which would appear by the way-bill,—they might refuse to receive the goods except upon prepayment; but if they received and carried them with a notification that certain rates only were to be charged for the whole transportation, they would doubtless be limited in their collection to that sum. But one company cannot possess power, arbitrarily and in the absence of consent, to fix the rates for transportation by another, on the ground solely that the two form a continuous line between two points. It must be equally without power to make contracts diminishing the common-law liability of the other; inasmuch as all such contracts must be based upon a consideration, which only the party himself or his agent duly authorized is competent to agree upon. If the bills of lading in terms applied to the carriage for the whole distance, we should be required to hold, I think, that the defendants adopted their terms and consented to be bound by them when they received and carried the goods under them; but I have already said that such is not the case in respect to the particular bills now under consideration.

I think, therefore, that the defendants should be held liable for the wine, candles, and tobacco shipped from Cincinnati, unless the plaintiffs had been duly notified of their receipt at Detroit, and had had reasonable time after notice to remove them before the fire had occurred. It is admitted that no notice was given of the receipt of the wine and candles, but of the arrival of the tobacco the plaintiffs were notified about half-past three o'clock in the afternoon of the 26th of April. The defendants were in the habit of closing their depot at six P. M. The fire occurred on the same evening. I am of opinion that a reasonable time was not afforded for the removal after the notice. It might not be proper to attempt to lay down any general rule as to what shall constitute reasonable notice in

these cases, where the record discloses so little which bears upon the point; but it seems quite clear to my mind that two hours and a half are not sufficient, especially in view of the notice which defendants give to consignees,—that they will charge for storage after twenty-four hours,—which may possibly have led to a general impression that the relation of warehousemen was not to be considered as established until the expiration of that time. I think, therefore, the plaintiffs should have judgment for the value of the tobacco also. For the eggs delivered to the defendants at Adrian and Hudson, under an exemption from liability for losses in consequence of fire in the depot, the defendants cannot be held liable under the principles hereinbefore stated.

CHRISTIANCY, J., concurred.

115. BULLARD V. AMERICAN EXPRESS CO.,

107 Mich. 695; 65 N. W. R. 551; 61 Am. St. R. 358. 1895.

Case, against an express company for damages caused by the refusal of defendant to collect and deliver packages at his place of business. Verdict directed by court for defendant.

MONTGOMERY, J. This is an action in case, commenced in justice's court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas Avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his shipments, and to deliver packages to him, which defendant refused to do; that defendant collects for shipment from and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, conditions, and situation as the plaintiff, and for shippers at a greater distance from his place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff

by such refusal; that plaintiff has been damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice's court. In the circuit court the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in evidence that plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, caused damage to plaintiff.

At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of a custom of receiving goods at other places: *Hutchinson on Carriers*, secs. 82, 87; *Blanchard v. Isaacs*, 3 Barb. 388. But it is insisted that the defendant in this case, having practiced the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them.

The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee: *Wood's Browne on Carriers*, sec. 230; *Hutchinson on Carriers*, sec. 379. The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that when the business of an office is so small that the company cannot or does not keep a messenger to

make personal delivery, it is not unreasonable to require the consignee to call at the office: Hutchinson on Carriers, sec. 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in apparent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with it having knowledge of this fact, it is not bound to deliver beyond these limits. We do not determine what the rights of one not having knowledge of these limits would be. This is not such a case. But in this case we think the court committed no error in directing a verdict for the defendant.

Judgment will be affirmed.

LONG, GRANT, and HOOKER, JJ., concurred.

MCGRATH, C. J., did not sit.

116. SWEET V. BARNEY,

23 N. Y. 335. 1861.

Action against an express company as a common carrier for the value of a package of money delivered to defendants, directed to "People's Bank, 173 Canal St., New York." The plaintiffs, bankers in Dansville, sent the package, containing \$2,892 to their correspondent, the People's Bank, in New York city. The express company delivered it at their office in that city to one Messenger, an employee of the People's Bank, who had within 18 days previous to the delivery of this package received nine other packages in similar manner without objection from the bank. This package was stolen by him. Defendants had a verdict at the circuit, which was affirmed at the general term by the Supreme Court in the seventh district. Appeal to Court of Appeals.

JAMES. J. That these defendants were common carriers can hardly be doubted. Persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper and such other articles of value as parties see fit to trust to their care for the purpose of transporting the same from one place

to another for a compensation, are common carriers, and responsible as such for the safe delivery of property intrusted to them. (*Russell v. Livingston*, 19 Barb. 346; *Sherman v. Wells*, 28 Id. 403.) Such was the business of these defendants, and such their responsibility.

The consignee is the presumptive owner of the thing consigned; and when the carrier is not advised that any different relation exists, he is bound so to treat the consignee; but this presumption may be rebutted; and if in an action for non-delivery by the consignor against the carrier, that presumption be overcome, the action is properly brought in the consignor's name. (*Price v. Powell*, 3 N. Y. 322.) But in this case, unless a delivery of the money be established, the plaintiffs' right to recover was made out.

There was no notice that the contents of the package in question belonged to the consignors; nor was there any fact proved, calculated to weaken the presumption of ownership in the consignee. The defendants were, therefore, not only authorized but fully justified in treating the consignment as the property of the bank. The defendants could not know that they were employed to make a deposit in the "People's Bank" for the benefit of the assignors; or that this package was entitled to or demanded a special delivery. There was, in fact, nothing in the transaction to advise them that this package was to be treated differently from other packages actually belonging to the bank; and, therefore, any delivery good against the bank discharged the carrier.

The principal question then is, was there a delivery good against the bank? If there was, the plaintiffs must follow the bank; they have no cause of action against these defendants. It is conceded that the liability of a carrier begins with the receipt of the goods by him, and continues until the delivery of the goods by him, subject to the general exceptions. And an express carrier is bound to deliver the goods at their destined place, to the consignee, or as the consignee may direct. In general, the delivery must be to the owner or consignee himself, or to his agent (11 Metc. 509), or they must be carried to his residence, or they may be taken to his place of business, when from the nature of the parcels that is the appropriate place for their delivery. But there is no rule of law requiring a delivery at the consignee's residence or place of business, when he is willing to accept it at a different place, or directs a delivery at another place. The consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of des-

tinuation, and such acceptance operates as a discharge of the carrier from his liability. (Omitting a citation from *Lewis v. Western R. Corp.*, 11 Metc. 509.)

Had the consignee in this case received the package in question at the defendants' office I think no one would doubt the defendants were discharged. The case then turns upon Messenger's agency. If an authorized agent in the premises, a delivery to him was as effectual as a delivery to the principal. The question of agency was a question of fact, and was settled by the verdict of the jury.

We think the delivery at the office of the defendants to the authorized agent of the consignee was proper, and operated to discharge the defendants from their obligations as carriers.

This disposes of the case unless there was some error committed at Circuit in submitting the question of Messenger's authority to the jury, or in the courts refusing to charge as requested. I have been unable to discover any such error. The evidence submitted was competent—it was of the most perfect and satisfactory kind, and not only justified but required the verdict rendered. The judgment should be affirmed.

117. HASSE V. AMERICAN EXPRESS CO.,

94 Mich. 133; 53 N. W. Rep. 918; 34 Am. St. R. 328. 1892.

Action against defendants as common carriers. Plaintiffs are clothiers in Detroit. They sent three parcels of clothing marked "C. O. D.," addressed, respectively, to McMillan, Wick and Hart, Marquette. The first two were not at home, but returned in about ten days, and went to the express office and notified the agent to hold the package another week and they would pay for the goods and take the same. Hart was unknown to the company, and failed to respond to a written notice sent through the mail. On the day that McMillan and Wick called, the express agent notified plaintiffs by mail of these facts, and that the packages remained in the office unpaid. That night, and before the notices reached plaintiffs, the express office and the three parcels were destroyed by fire. There was no fault on the part of defendants. Verdict was directed for plaintiffs.

GRANT, J. (After stating the facts.) The defendant's contract as common carrier was to safely carry the goods to their destination, to notify the consignees of their arrival, and to offer delivery upon payment of the amounts. This duty it had fully performed, and with such performance its liability as a common

§§ 117, 118 TERMINATION OF CARRIER'S RELATION.

carrier terminated. Its further duty was to safely store and care for the goods, hold them a reasonable time to enable the consignees to pay, if they were not ready to pay immediately, and then to notify the consignors. The liability meanwhile was that of warehouseman: Hutchinson on Carriers, sec. 392; Weed v. Barney, 45 N. Y. 344, 6 Am. R. 96; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. R. 402; Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. D. 582; Marshall v. American Express Co., 7 Wis. 1, 73 Am. D. 381.

In Weed v. Barney, 45 N. Y. 344, 6 Am. R. 96, the goods were sent C. O. D., arrived at their destination March 17th, the consignees were promptly notified, and promised to take and pay for them, and the goods remained in the storehouse until April 16th, when they were destroyed by an explosion without the fault of the defendants. No notice had meanwhile been given to the consignor. It was held that no notice was essential.

It is a matter of common knowledge that those sending goods by express with instruction to collect their value before delivery expect express companies to retain them in order to give the consignees an opportunity to pay for and take the goods. Consignors so sending goods understand that the goods must be deposited in the storehouses of these companies. There is no reason, under such circumstances, in holding these companies to the strict liability of common carriers. We think that under the agreed facts in this case the defendant is not liable.

Judgment reversed, and judgment entered here for the defendant; with costs of both courts.

118. PACIFIC EXPRESS CO. V. SHEARER,

160 Ill. 215; 43 N. E. R. 816; 52 Am. St. R. 324. 1896.

Action to recover from the express company \$4,000 delivered by it to an imposter. One Stubblefield had had business dealings as a stockbuyer with Shearer & Co., and they had frequently made him advances of money by draft, letter of credit or express. Stubblefield arrived at Chepota, Kansas, late one night and retired at a hotel, without registering, and next morning left Chepota. Another man got off the same train and went to another hotel. Next day this last man claimed that his name was Stubblefield, went to the telegraph office and telegraphed Shearer & Co. to express him \$4,000. He received an answer by telegraph with a request for particulars, to which he telegraphed, "Bought 240 corn fed Texas, top of 300, at \$20 a head." He

also ordered stock cars on a side track for receiving cattle for Stubblefield, and informed the landlord of his arrangements. Later he called at the express office for the package. Asked to identify himself, he stated his name, his initials, the amount of the money, and exhibited the telegrams, and some accounts of sales of stock between Stubblefield and Shearer & Co. He also brought the landlord to testify to his identity, and to the fact that he had stock cars on the side track awaiting his shipments. The money was thereupon paid to him. The fraud was not discovered until too late to prevent delivery of the package to the imposter. Plaintiff recovered below.

CRAIG, C. J. (After stating some of the instructions and refusals to instruct.) It is apparent from the record that the package was delivered to the person in response to whose telegraphic order appellees sent the package, appellees at the time believing such person to be J. C. Stubblefield; and it is, no doubt, also true that, at the time of delivery, the agent of appellant ascertained that the person who demanded the package, and to whom it was delivered, was the person in response to whose order appellees sent the same, and that appellees treated the order for the money as the order of J. C. Stubblefield; and it may also be true that the agent used reasonable diligence to ascertain the identity of the person who demanded the package before it was delivered. Would these facts relieve the carrier of liability for delivering the package to a person to whom it was not consigned?

In Hutchinson on Carriers, section 344, the rule with reference to delivery is stated as follows: "No circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind, and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned."

In United States Exp. Co. v. Hutchins, 67 Ill. 348, 350, where an action was brought against the express company for its failure to deliver a package of money left with it to be carried and delivered, this court said in regard to the liability of the company: "They became insurers for its safe delivery. Being so, nothing can excuse them from their obligation safely to carry and deliver, but the act of God or the public enemy. This rule

of the common law, the rigid application of which has given so much satisfaction and security to the commerce of nations, is properly invoked in cases like this."

In *Baldwin v. American Exp. Co.*, 23 Ill. 197, 74 Am. Dec. 190, where an action was brought against the company to recover the value of a package of money which it, as common carrier, undertook to carry from Chicago to Madison, Wisconsin, and deliver to a certain named person, it was held to be the settled doctrine of England and of this country that there must be an actual delivery to the proper person, and in no other way can the company discharge itself of responsibility as a common carrier, except by proving that it has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or the public enemy. After citing authorities in support of this position, it is said: "It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers, and are under that responsibility." In *Gulliver v. Adams Exp. Co.*, 38 Ill. 503, the rule announced in the case last cited was sanctioned and approved.

In *American etc. Exp. Co. v. Milk*, 73 Ill. 224, an action was brought against the company to recover for a package of money delivered to the company in Du Page county, to be forwarded to Kankakee. When the package arrived at its destination, the agent of the company delivered it to a certain person on a forged order of the consignee. It was held that it is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee, and the only way it can relieve itself from responsibility as a common carrier is by showing performance, or its prevention by the act of God or the public enemy, and that it is not discharged by delivering the same to another on a forged order of the owner. The same doctrine is announced in *American etc. Exp. Co. v. Wolf*, 79 Ill. 430.

The decisions of this court are believed to be in harmony with the law as declared in the text-books and as announced by a large majority of the courts of last resort of the country. The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is the real person to whom the goods have been consigned, and the carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care. The business interests of the country, as well as the rights of a con-

signor who pays a liberal price for the transmission of his property, alike demand that the carrier should be held to a strict accountability.

There are a number of cases in the books where a delivery of goods has been made by the carrier to the wrong person under circumstances not unlike the facts under which the money was delivered here, where the carrier was held liable. In *American Exp. Co. v. Fletcher*, 25 Ind. 493, a person pretending to be J. O. Riley called on the telegraph operator and agent of the express company and sent a telegram to plaintiff requesting a certain sum of money by express. In a short time, the same agent received by express a package of money addressed to J. O. Riley. The person who had sent the telegram for the money called on the agent and operator and demanded the package of money, which was delivered over to him. Subsequently, it turned out that the person who sent the telegram and to whom the money was delivered was not J. O. Riley, and the express company was held liable for the money. In the decision of the case, the court, among other things, said: "The express undertaking of the appellant was to deliver the package to J. O. Riley in person. The utmost that the answer alleged was, that the delivery was to another person who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name. This was no better evidence that his name was Riley than if he had so stated to the express agent or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley simply proved that Riley had credit, or some arrangement with the plaintiff to furnish him money, and that the package was sent to him—not that he was the person who sent the dispatch or that anyone pretending to be him was to receive it."

Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107, is another case in point. There an instruction had been given which was, substantially, that the express company, without reference to the party who may have ordered the money sent or who may have telegraphed for it, was bound to deliver to the plaintiff if it was sent to him and he was the owner. On behalf of the express company, it was insisted that the instruction did not announce a correct rule of law, but the court held otherwise, and said: "This instruction, viewed in reference to the testimony, is nothing more than that a forged telegram is no excuse for the delivery to a party not the owner and to whom it was the contract of the carrier to deliver it. . . . Notwithstanding the forged telegram, this carrier, in making a personal delivery, was bound by law to deliver to the person to whom

the package was addressed, he being its true owner. It is the settled doctrine of England and this country that there must be an actual delivery to the proper person, . . . and in no other way can the carrier discharge his responsibility, except by proving he has performed such engagement or has been excused from performance, or been prevented by the act of God or a public enemy": See, also, *American Exp. Co. v. Stack*, 29 Ind. 27.

Price v. Oswego etc. Ry. Co., 50 N. Y. 213, 10 Am. Rep. 475, is an interesting case on the question. There the person who ordered the goods in the name of a fictitious firm, S. H. Wilson & Co., was the same person who received and receipted therefor in the name of such fictitious firm. It seems that the referee found "that the delivery by the carrier was to the same person who made the order for the goods," and he also found, as a conclusion of law, that the delivery to such person, without notice of fraud, relieved the carrier of liability. But the court of appeals reversed the judgment and held the carrier liable, and, among other things, said: "It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods, or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to him would not protect the carrier any more than if made to any other person."

Duff v. Budd, 3 Brod. & B. 177, 7 Eng. Com. L. 399, is also a case in point. There the person who received the goods was the same who ordered them in a fictitious name, but it was held the carrier had no authority to deliver them to such person, and the owner was entitled to recover of the carrier.

Dunbar v. Boston etc. R. R. Co., 110 Mass. 26, 14 Am. Rep. 576, and *Edmunds v. Merchants' etc. Co.*, 135 Mass. 283, are relied upon by the appellant to sustain the delivery of the package. In the first case cited, one John F. Gorman called on Dunbar, in Boston, and represented that he was John H. Young, of Providence, Rhode Island. He purchased on credit a quantity of goods, and had them consigned to John H. Young, Providence, Rhode Island. Upon the arrival of the goods in Providence, Gorman, who had made the purchase in person, presented himself to the carrier, and, as the agent of Young, demanded the goods. The goods having been delivered to him, Dunbar sued the carrier for a misdelivery, but the court held that the action would not lie. The decision, as we understand it, is predicated

on the ground that the goods were consigned and delivered to the person who actually, in person, made the purchase under an assumed name. In the other case it appeared that "a swindler, claiming to be Edward Pape, of Dayton, Ohio, purchased goods from plaintiff by personal negotiation. There was a man whose true name was Edward Pape, in Dayton, Ohio—a reputable business man, whom the plaintiff supposed the swindler to be. The goods were delivered by plaintiff to the defendant, to be carried to Dayton and delivered to Edward Pape. The defendant delivered to the swindler." The court held that the carrier was not liable. In the opinion the court said: "The sale was voidable by the plaintiff, but the carrier, by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the directions upon the package, and who was the person to whom the plaintiff sent them." There is a marked distinction between these cases and the one under consideration, and they cannot control here.

Another case relied upon is *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. That case, in its facts, is more like the one under consideration than any that has been cited by appellant, and it seems to sustain the position of appellant. But while we recognize the ability of the court in which the case was decided, we do not regard the rule laid down as the correct one, and we are not inclined to follow it.

Some other cases have been cited in the argument of counsel, but it will not be necessary to refer to them here. The cases bearing on the question are not entirely harmonious, but the rule adopted in this state and in the courts of many other states, that the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned, is, as we think, the only safe rule to be adopted. This rule gives protection to the consignor, who pays his money to the carrier to transport and deliver goods to the consignee, and at the same time imposes no unreasonable responsibility on the carrier. When money or goods have been delivered to a carrier to be carried and delivered to a certain named person, when they reach their destination it is the business of the agent of the carrier to deliver to the real person to whom they are consigned, and, as said by Hutchinson, no circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a de-

livery to the wrong person. Where the consignee is unknown to the agent of the carrier, it is his duty to hold the goods until the consignee furnishes ample proof that he is the person to whom the goods were consigned. When Shearer & Co. received a telegram from J. C. Stubblefield, and forwarded a package of money directed to J. C. Stubblefield, they supposed and believed the order came from the man with whom they had previously had dealings and with whom they were personally acquainted, and, when they delivered the package to the carrier, it was consigned to him. The fact that an impostor had sent a telegram in the name of J. C. Stubblefield, and a reply to J. C. Stubblefield was returned which was delivered to the impostor, did not authorize the agent of the carrier to deliver the package directed to J. C. Stubblefield to an impostor representing that he was J. C. Stubblefield. Here the package of money was consigned to J. C. Stubblefield, and the carrier was directed to deliver the money to him and to him only. This was not done. The money was never delivered to J. C. Stubblefield, but the agent of the carrier delivered it to an impostor, and for a failure to deliver the package to J. C. Stubblefield the carrier is liable.

The judgment of the appellate court will be affirmed.

119. HAWKINS V. HOFFMAN,

6 Hill (N. Y.) 586, 41 Am. D. 767. 1844.

Case, against defendant as a common carrier for the loss of a trunk containing samples of goods used by one Mason in his business as traveling salesman for plaintiff. The trunk was lost while Mason was traveling with it on defendant's steamboat. Plaintiff nonsuited below.

By Court, BRONSON, J. Trover will lie where the goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as where the goods are by mistake, or under a forged order, delivered to the wrong person: *Youl v. Harbottle*, Peak. Cas. 49; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Stephenson v. Hart*, 4 Bing. 476; *Lubbock v. Inglis*, 1 Stark. 104. But it will not lie for the mere omission of the carrier; as where the property has been stolen or lost through his negligence, and so can not be delivered to the owner. The remedy in such cases is *assumpsit*, or a special action on the case: *Anon.*, 2 Salk. 655; *Ross v. Johnson*, 5 Burr. 2825; and see *Dewell v. Moxon*, 1 Taunt. 391; 2 Saund. 47, f; *McCombie v. Davies*, 6 East, 538. Mere non-feasance does not work

a conversion of the property; and although the owner may have another action, he can not maintain trover. Here, the trunk was lost, and the plaintiff can only recover, if at all, upon the counts which charge the defendant as a carrier. A demand and refusal would not alter the case, for as the trunk was either stolen or lost, the defendant could not deliver it. Demand and refusal are only evidence of a conversion where the defendant was in such a condition that he might have delivered the property if he would. If the defendant was a common carrier of the lost trunk, it would then be important to inquire whether there was a complete delivery of the property to Mason at Poughkeepsie. If there was a full transfer from the custody of the boatmen to the charge of the owner, the defendant's contract was performed, and he was no longer answerable for the property as a common carrier. But although the evidence tended pretty strongly to show a complete delivery, I do not think it so conclusive as to warrant the judge in taking the question from the jury, if the cause turned upon that point. He undoubtedly went upon the ground that the defendant was not to be regarded as a common carrier of the trunk; and that is the principal question in the cause.

Although I do not find it stated in the case that Mason paid anything to the boat-owner, either for freight or passage, yet the whole argument, on both sides, went upon the ground that he had paid the usual fare of a passenger, and nothing more: that he neither paid, nor intended to pay anything for the trunk; but designed to have the same pass as his baggage. It was formerly held, that the owner of the boat or vehicle was not answerable as a carrier for the luggage of the passenger, unless a distinct price was paid for it. But it is now held that the carrying of the baggage is included in the principal contract in relation to the passenger; and the carrier is answerable for the loss of the property, although there was no separate agreement concerning it. A contract to carry the ordinary baggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight. But this implied undertaking has never been extended beyond ordinary baggage, or such things as a traveler usually carries with him for his personal convenience in the journey. It neither includes money, nor merchandise: *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Pardee v. Drew*, 25 Id. 459.

It was suggested in the first case, that money to pay traveling expenses might, perhaps, be included. But that may, I think, be doubted. Men usually carry money to pay traveling

expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage. It is going far enough to imply an agreement to carry freight of any kind from a contract to carry the passenger; for the agreement which is implied is much more onerous than the one which is expressed. The carrier is only answerable for an injury to the passenger, where there has been some want of care or skill; but he must answer for the loss of the goods, though it happened without his fault. Still, an agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication can not be extended a single step beyond such things as the traveler usually has with him as a part of his luggage. It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.

In this case the plaintiff sent out Mason as his "traveler" or agent to seek purchasers for his goods, and the trunk in question contained samples of the merchandise which he wished to sell. The samples were not carried for the personal use, convenience, instruction, or amusement of the passenger in his journey; but for the purpose of enabling him to make bargains in the way of trade. Although the samples were not themselves to be sold, they were used for the sole purpose of carrying on traffic as a merchant. They were not baggage within the common acceptation of the term; and as they were not shipped or carried as freight, the judge was right in holding that the plaintiff could not recover.

New trial denied.

120. M'ENTEE V. NEW JERSEY STEAMBOAT CO.,

45 N. Y. 34, 6 Am. R. 28. 1871.

Action for conversion of some bundles of lath and blinds shipped by one Sayer to "McEntee," New York. Plaintiff de-

manded the goods and was refused. Evidence as to the form of the refusal was conflicting, but there was evidence introduced to show readiness to deliver if plaintiff would properly identify himself as the consignee, or as having authority to receive the goods. Upon a ruling that carriers had no right to insist upon such identification verdict was rendered for plaintiff.

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but, if the refusal was qualified, the question was, whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. *Alexander v. Southey*, 5 B. and Ald. 247; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. D. 607; *Rogers v. Weir*, 34 N. Y. 463; *Mount v. Derick*, 5 Hill, 455. If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers, are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. D. 767; *Powell v. Myers*, 26 Wend. 591; *Devereux v. Barclay*, 2 B. and Ald. 702; *Guillaume v. Hamburg and Am. Packet Co.*, 42 N. Y. 212, 1 Am. R. 512; *Duff v. Budd*, 3 Brod. and Bing. 177. The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission

§§ 120, 121 TERMINATION OF CARRIER'S RELATION.

of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

121. PENNSYLVANIA RAILROAD CO. V. STERN,

119 Pa. St. 24; 12 Atl. 756; 4 Am. St. R. 626. 1888.

Action for loss of consignment of bones improperly delivered by the carrier. The court below ordered a verdict for plaintiffs.

PAXSON, J. The only error assigned is to the charge of the court. It was in substance that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs.

We see no error in this. The plaintiffs shipped this carload of dry bones from Bay City, Michigan, to Landenburg, Chester County, Pennsylvania, consigned to themselves. At the same time they drew on Whann for the amount, at forty-five days. There was a bill of lading attached to the draft, showing that Stern and Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, both of which were shown to the agent of the defendant company at Landenburg, were notice that there was a draft and bill of lading, and that Whann was required to protect the draft. The agent delivered the car to Whann without the bill of lading, and without an acceptance of the draft. This he had no right to do. The title to the property remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete

delivery of the property under and in pursuance of the bill of lading, and to the persons entitled to receive the same: *Hieskell v. Farmers' and Merchants' National Bank*, 89 Pa. St. 155, 33 Am. Rep. 745. There could be no delivery except in accordance with the bill of lading: *Dows v. Milwaukee Bank*, 91 U. S. 618; *Stollenwerck v. Thatcher*, 115 Mass. 224. The invoice standing alone furnishes no proof of title: *Benjamin on Sales*, sec. 332; *Dows v. Milwaukee Bank*, *supra*.

It was urged, however, that there was a course of dealing between the parties that would take the case out of the rule above stated. The attention of the court below does not appear to have been called to this matter upon the trial. No reference to it is to be found in the charge, nor was any point submitted which would call it forth. There was evidence that the defendant company had on more than one occasion delivered goods from the same shippers to Whann prior to the acceptance of the drafts. No harm came of this, because the drafts were afterwards accepted and paid. But this course of dealing between the company and Whann was not brought home to the knowledge of the plaintiffs in a way that would justify the jury in finding that they had acquiesced in such an arrangement, and that they had consented to the delivery of this particular car-load without the production of the bill of lading and acceptance of the draft. The company delivered in their own wrong and assumed the risk.

Nor can we say as matter of law that plaintiffs suffered no loss by reason of the improper delivery. If the draft had been accepted, it might have been paid, notwithstanding the failure of Whann, or the plaintiffs might have sold it without recourse.

Judgment affirmed.

122. DYER V. GREAT NORTHERN RAILWAY CO.,

51 Minn. 345; 53 N. W. R. 714; 38 Am. St. R. 506. 1892.

COLLINS, J. Plaintiffs were the consignors, one Colwell, the consignee, and defendant, the common carrier, of a piano shipped from Minneapolis to Anoka over its line of railway. When the instrument was delivered to defendant for carriage, its agent gave the usual bill of lading to plaintiff, and this was immediately transmitted by them to Colwell, the consignee. Soon after its arrival at Anoka, and before Colwell had the opportunity to remove it from the depot, the piano was destroyed by fire. Thereupon Colwell made a claim upon defendant for

its value, producing the bill of lading and an invoice, from which it appeared that he had purchased the piano from plaintiffs, and had partly paid for the same. The fact was that the sale to Colwell was conditional, a written contract having been made that the title to the instrument should remain in plaintiffs until Colwell paid for it in full, and a copy of this contract had been duly filed in the office of the proper city clerk a few days before the fire, in compliance with the provisions of the statute: Gen. Stats. 1878, c. 39, secs. 15, etc. Defendant had no actual knowledge of this, and had not been advised in any manner as to plaintiff's claim upon the piano when, in settlement of Colwell's demand, it paid to him its full value.

It is thoroughly settled that if no other facts appear the consignee, and not the consignor, of property delivered to a common carrier must be considered its owner: *Benjamin v. Levy*, 39 Minn. 11, 38 N. W. R. 702. The legal presumption is that upon the delivery of goods to a common carrier the title thereto vests in the consignee, and this presumption the carrier has a right to rely upon, in the absence of express notice from the consignor to the contrary. The carrier, therefore, has the right to settle with the consignee in case the property is lost, stolen, or destroyed: *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. R. 284; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; 2 Am. & Eng. Ency. of law, 810, 811, and cases cited in notes. Again, upon the stipulated facts, Colwell had a special property in the instrument, and as a special owner could recover its full value from the defendant: *Chamberlain v. West*, 37 Minn. 54, 33 N. W. R. 114. See, also, *Jellett v. St. Paul etc. Ry. Co.*, 30 Minn. 265, 15 N. W. R. 237; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. R. 633; *Marsden v. Cornell*, 62 N. Y. 215; *Boston etc. R. R. Co. v. Warrior Mower Co.*, 76 Me. 260; *White v. Webb*, 15 Conn. 305. Counsel for respondents do not take issue upon these propositions, but insist that, on the filing of a copy of the conditional contract of sale, as before stated, defendant carrier had notice that their clients retained title to the property, and was bound by such notice. The statutes (Gen. Stats. 1878, secs. 15, etc.) have no application. They were enacted for the benefit and protection of the parties therein mentioned, namely, creditors of the vendee, subsequent purchasers, and mortgagees in good faith, and the well-established rules of law fixing defendant's liability as a common carrier were in no manner affected by the provisions therein contained.

Order reversed.

123. CHAMPION V. BOSTWICK,

18 Wend. (N. Y.) 175, 31 Am. D. 376. 1837.

Case, by Bostwick and wife for injury to the latter from a collision while she was in a stage coach. The injury was due to the negligence of the driver. Verdict for defendant. New trial denied, and defendants sued out a writ of error.

WALWORTH, Chancellor. The plaintiffs below have been permitted to recover for an injury sustained by the wife in being run over by the driver of a coach and horses, forming part of a continuous line of stages between Utica and Rochester. The injury took place on a part of the route between Utica and Vernon; and was done by a coach and horses belonging to Dodge, or which had been hired to him by the year, and by a driver in his immediate employ. And the only question for the consideration of this court is, whether the arrangement between the owners of the different parts of the line between Utica and Rochester was such as to render Champion and Ewers liable to third persons for such an injury, as partners of Dodge in this part of the line. From the nature of the arrangement between the different stage owners, it is very evident that, as between themselves, Dodge alone ought to sustain the loss; and that if the recovery had been against him solely, he would not have been entitled to call upon the stage owners upon other parts of the line for contribution; and in case this recovery against the others is sustained, he would be bound to make good their loss if he were not insolvent.

As between these different stage owners, Stevens, the driver, was clearly the servant of Dodge only. Dodge, therefore, is ultimately liable to them for any injury which they may sustain by the carelessness of his servant while in his employ; to the same extent as if such injury had been occasioned by his own carelessness while driving the coach and horses himself.

I think, however, that the arrangement made between the stage owners, as to the division of the passage money received upon any part of the line, was such as to render them all liable to third persons, as copartners, for such an injury as this; or for any injury to the passengers on any part of the route; and also rendered them liable for any contract made by either of such owners which was directly connected with the receipt of the passage money, or the increase of the profits on any part of the entire route. By the agreement between them the passage money received by either for the transportation of passengers

over any part of the line constituted a common fund, out of which the tolls on the whole route were first to be paid, and the residue was then to be divided among the owners of the different parts of the line in proportion to the distances run by each, whether such passage money was received for the transportation of passengers over one part of the line or another.

This division of the whole passage money, after paying out of the same the expenses of the tolls, was a division of the profits of a joint concern, so as to constitute a partnership between themselves as to that fund; to entitle either of them to an account; and to render them liable to third persons as partners as to everything in which the different owners of that fund had a joint or common interest. If Dodge had received the passage money for the transportation of a passenger over his part of the route only, he would have received it for the benefit of the whole concern, as they all had a common interest in the profits of that part of the line. All, therefore, would have been liable to such passenger, as partners in this part of the route, for any damage he might sustain in consequence of a refusal of Dodge to transport him from Utica to Vernon; or for any injury which might happen to him by the carelessness of Dodge or his driver, or by reason of any defect in the coach or harness or the team. The case would be entirely different if each stage owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof; and was only to act as agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case there would be no joint interest, and no liability to third persons as partners.

The case of *Wetmore and Cheesebrough v. Baker and Swan*, 9 Johns. 307, does not decide that there was no partnership in that case. As to a part of the transaction there was a partnership, not between the five persons, but between the two firms of W. & C., and B. & S., and Ostrom. Ostrom was to run one part of the route, W. & C. another part, and B. & S. ran the residue of the route. But the expense of extra carriages was to be borne by all of the parties jointly. To this extent there was a copartnership between the three owners of different parts of the route; and all would clearly have been liable to third persons for the line of extra carriages, if any had been necessary. But there was a settlement and an account stated between the three parties to this arrangement, one of the partners in each of the firms of W. & C. and B. & S. being present and agreeing to such liquidation of the accounts. In conformity with which settlement the money then in Albany was to be paid to B. & S.;

but it was afterwards received by the firm of W. & C., who were sued by B. & S. for money had and received to their use. The only question, therefore, was, whether the settlement and adjustment of the joint concern by Cheesebrough, the partner of Wetmore in their part of the route, was binding upon such partner. In other words, whether the running of the stages on the whole line was a joint concern between the five individuals as copartners, or a joint concern between Ostrom and the two firms of W. & C. and B. & S. And the court very correctly decided that there was no partnership existing between the five individuals which could interfere with a recovery in that suit.

It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the individual partners separately. It is sufficient to constitute a partnership if the parties agreed to have a joint interest in, and to share the profits and losses arising from the use of property or skill, either separately or combined. Here the capital which each contributed or agreed to contribute to the joint concern, was the horses, carriages, harness, drivers, etc., which were necessary to run his part of the route; and to be fed, repaired, and paid at his own expense. The only debts or expenses for which they were to be jointly liable as between themselves were the tolls upon the whole line; and the joint profits which they were to divide, if any remained after paying the tolls, was the whole passage money received upon the entire line. Although it may be fairly inferred that each party supposed that the expenses of running his part of the line, exclusive of the tolls, would be equal to the distance run by him, it by no means follows that any of them supposed that the actual passage money or profits of the different parts of the line would be in the same proportion; as it is a well-known fact that the number of passengers who travel in public conveyances increase as you approach large market towns, or other places of general resort. The only object of the agreement to divide the passage money earned upon the whole line among the different proprietors, must have been to give to those who run that part of the line where there was the least travel, a portion of the passage money on other parts of the route, as a fair equivalent for their equal contribution of labor and expense for the joint benefit of all. And as all the owners of the line were thus interested in every part of the route, and were liable to the passengers if they were unreasonably detained on the way, I am inclined to think that if the driver of either had refused to carry on the passengers over his

part of the line, without any sufficient excuse, either of the other parties who happened to be present might have employed another driver, at the common expense, to proceed with the team to the end of that route, although as between themselves the owner of that part of the line would be bound to pay such extra expense. And the same right would have existed if the driver, by reason of intoxication or otherwise, was incapable of discharging his duty with safety to the passengers. Although the title to the coach and horses for the time being might not be so far vested in the partners as to authorize any of them to take them out of the possession of the general owner himself, under similar circumstances, the passengers might unquestionably be sent on by either of the others at his expense; or at the expense of all the owners of the line who were interested in having it done, if he was unable to pay the expense.

There is a class of cases in which it has been held, that a person who merely receives a compensation for his labor, in proportion to the gross profits of the business in which he is employed, is not a partner with his employer even as to third persons. The distinction appears to be between the stipulation for a compensation proportioned to the profits, and a stipulation for an interest in such profits so as to entitle him to an account as a partner: 1 Rose, 91; a distinction which Lord Eldon says is so thin that he can not state it as settled upon due consideration. But he says it is clearly settled as to third persons, though he regrets it, "that if a man stipulates that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to the *quantum* of profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account though having no property in the capital, he is as to third persons a partner; and no arrangement between the parties themselves can prevent it:" Ex parte Hamper, Stark's Law of Part. 137. Cary, however, defends the principle upon which this distinction is based. He insists that as the person who is to receive a compensation for his labor in proportion to the profits of the business, without having a specific lien upon such profits to the exclusion of other creditors, it is for their interest that he should be compensated in that way, instead of receiving a fixed compensation whether the business produced profits or otherwise; on the other hand, that if he stipulates for an interest in the profits of the business which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, and giving him the full benefit of the increased profits of the business without any corresponding risk

in case of loss, it would operate unjustly as to other creditors; and therefore, that it is perfectly right in principle, that he should be holden to be liable to third parties as a partner in the latter case but not in the first: Caryl on Part. 11, note i. I am inclined to think this distinction is a sound one as regards the rights of third persons. But as between the parties themselves it is perfectly competent for them to agree that one shall have his full share of the anticipated profits as a compensation for his labor or skill, without running any risk of absolute loss, except as to third persons, if instead of producing profits the business should prove a losing concern. Many of the cases cited by the counsel for the plaintiffs in error, were those in which the question arose between the immediate parties to the agreement which was supposed to make them partners as between themselves; and they may therefore be reconciled with other cases in which they were held to be liable as partners to third persons upon the principles before stated.

That one partner is liable in tort for the acts of his copartner in the prosecution of the copartnership business, as well as upon contracts for the benefit of the joint concern, appears to be well settled. And the case of *Waland v. Elkins*, 1 Stark. 272, Holt N. P. 227, is in point, to show that each is liable in tort for the negligence of the servant employed and paid by one of them exclusively, by which a third person is injured by such servant while engaged in the business from which both were to derive a profit. If one partner would be liable for the negligence of his copartner in such a case, it seems to be a necessary consequence that he should be liable for the same act if done by the servant of such copartner. In relation to the case of *Barton v. Hanson*, 2 Taunt. 49, in which it was held that a party jointly interested in a stage coach which was horsed by the proprietors separately on different parts of the line, was not answerable for corn purchased by one of the proprietors for the use of his own horses on his part of the line, Chief Justice Gibbs says, when the case was cited by the counsel for the defendant in *Waland v. Elkins*: "I recollect the case very well, but the decision there turned upon the inferior contract, if I may so term it, between the parties. In that case there was a particular contract between the parties, and it was known in what situation they stood in respect to each other." In other words, it was known in that case, as in this, that the different proprietors were to run their several parts of the line with their own teams and at their own expense; and the plaintiff had furnished one of the proprietors with grain for his horses, knowing that it was for his sole benefit; and as it was furnished on

§§ 123, 124 TERMINATION OF CARRIER'S RELATION.

his credit solely, the plaintiff had no just grounds for charging the partnership therewith. It was in fact trusting the individual with a part of the capital which he knew that individual had agreed to contribute to the partnership; and which the other partners are never liable for under such circumstances.

For these reasons, I think there was such a partnership between the plaintiffs in error in relation to the business in which Stevens the driver was engaged, at the time this injury was done, as to render them all liable to the defendants in error for the consequences of his negligence; and that the judgment of the supreme court should be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the court (twenty-four being present), with but two dissenting voices, voted in the negative. Whereupon the judgment of the supreme court was affirmed.

Judgment affirmed.

124. NASHUA LOCK CO. V. WORCESTER AND NASHUA
 RAILROAD CO.,

48 N. H. 339, 2 Am. R. 242. 1869.

Action to recover the value of ten cases of locks consigned to New York, and delivered to defendants at Nashua. The goods were safely carried by defendants and the intermediate carrier to the terminal carrier, the Norwich Transportation Company, and were shipped on one of their steamers for New York. The steamer came in collision with a sailing vessel, caught fire and was destroyed with its freight.

PERLEY, C. J. According to the agreed case, the three corporations, the Worcester and Nashua railroad, the Norwich and Worcester railroad, and the Norwich and New York Transportation company, were engaged as common carriers in the business of transporting goods between Nashua and New York in a continuous line under an agreement by which they divided the price paid for transportation through in proportions fixed by the agreement. The agreement is not before us; but from the general statement of it in the case it must be inferred that the parties to it were mutually bound to transport goods on their connected line according to the direction given by the owner, when they were received for transportation in the usual course of the business by any one of the parties. In this case it would have been a violation of the agreement among the parties to the continuous line, if either the Norwich and Worcester railroad

or the transportation company had refused to receive and transport the goods toward their destination in the usual course of the business, as they were marked and directed when they were received by the defendants.

The contract between the plaintiffs and defendants must be implied from the facts stated in the agreed case. There was no special agreement, written or oral, that the goods should be carried to New York, nor that the responsibility of the defendants should end on delivery to the Norwich and Worcester railroad. The general question is, whether the defendants undertook for the transportation of the goods through to New York, or only agreed to carry and deliver, or tender, them to the Norwich and Worcester railroad.

Had the defendants corporate authority to contract for the transportation of the goods beyond their own line? We have no hesitation in holding that railroads may contract to carry goods and passengers beyond their own lines. They could not answer the main objects of their incorporation without the exercise of this power. They are laid out and established with reference to connections in business with other extended lines of transportation, and the power to contract for transportation over the connected lines is implied in the general grant of corporate authority. On this point the authorities are nearly unanimous. It has been held otherwise in Connecticut by the opinion of three judges against two. *Hood v. N. Y. & N. H. Railroad*, 22 Conn. 1; *Elmore v. The Naugatuck Railroad*, 23 Conn. 457, 63 Am. D. 143; *The Naugatuck Railroad v. The Button Company*, 24 Id. 468. But in a later case (*Converse v. The Norwich & N. Y. Transportation Company*, 33 Id. 166), the courts in that state have shown some disposition to recede from the doctrine of their earlier cases. No other authorities are cited by the defendants to this point, and I have found no others that sustain their view of this question. The authorities the other way are numerous and decisive (*Muschamp v. The Lancaster & Preston Railway*, 8 M. & W. 421; *Weed v. The S. & S. Railroad*, 19 Wend. 534; *The F. & M. Bank v. The Ch. Transportation Co.*, 23 Vt. 186, 56 Am. D. 68; *McCluer v. M. & L. Railroad*, 13 Gray (Mass.) 124, 74 Am. D. 624; *Noyes v. R. & B. Railroad*, 27 Vt. 110; *Wilcox v. Parmelee*, 3 Sandf. 610; *Perkins v. The P. S. & P. Railroad*, 47 Me. 573, 74 Am. D. 507); and railroads may contract for transportation beyond the limits of the states in which they are established (*McCluer v. The M. & L. Railroad*, 13 Gray (Mass.) 124, 74 Am. D. 624; *Burtis v. B. & S. L. Railroad*, 24 N. Y. 269); and when a railroad makes a contract for transporta-

tion beyond its own line it will be presumed that it had authority to do it. *McCluer v. M. & L. Railroad, qua supra.*

In the agreed case it is said the goods were received to be *forwarded*, etc., and from this phrase an argument is drawn that the agreement of the defendant was to forward to the next party in the line, and not to carry through to New York. But here was no express agreement in any particular terms, and we are not called on to interpret the language used in any contract. The nature of the undertaking must be inferred from the facts stated in the agreed case, and cannot be determined by the phrase used in stating them. Even in a written contract, where the term *forwarded* is used, if the thing to be done belongs to the business of a carrier, he will be charged as such. In *Wilcox v. Parmelee*, 3 Sandf. 610, the court say: "The criticism of the defendant on the word *forwarded* used in the contract is not just. It applies to the whole distance, as well to those portions of the route where other parties were owners of the vessels, as to that portion where he employed his own means of transportation. He was to forward the goods from New York to Fairport, not to Buffalo, which he now says was the terminus of his own immediate route. The words used by him can only mean that he was to carry or transport the goods, and whether in his own vessels or in those of others was perfectly immaterial to the plaintiff." In *Schroeder v. The Hudson River Railroad*, 5 Duer, 55, the defendants gave a receipt for goods "to be *forwarded* per Hudson river freight train to Chicago;" and under this receipt it was held that the defendants were bound to *carry* the goods to Chicago. So in the recent case of *Buckland v. The Adams Express Co.*, 97 Mass. 124, 93 Am. D. 68, the defendants were charged as common carriers, though they described themselves in the contract under which they received the goods, as "express forwarders." In the present case the undertaking of the defendants must be implied from the facts stated in the agreed case, and the particular language used in stating them is of no materiality.

Since the introduction of steam as the means of transportation by land and water the general question raised in this case has been much considered in different jurisdictions, and there is no little confusion and contradiction of authority respecting the rule which shall govern the rights and liabilities of the parties, where goods are put in the course of transportation to distant places through connected lines associated in the business of common carriers. Where such lines are engaged in carrying passengers and their luggage the several parties to the continuous line incur, it would seem, the same liabilities for damage and loss of the luggage as in cases where they carry goods only.

Darling v. The Boston & Worcester Railroad, 11 Allen, 295; Quimby v. Vanderbilt, 17 N. Y. 312, 72 Am. D. 469; Weed v. The Railroad, 19 Wend. 534; The Ill. Central Railroad v. Copeland, 24 Ill. 332, 76 Am. D. 749; Ill. Central Railroad v. Johnson, 34 Id. 389.

In England and in several of the United States it has been held that when a railroad or other common carrier receives goods marked or otherwise directed for a place beyond the carrier's own line, this alone is *prima facie* evidence of a contract to carry the goods to their final destination, though the freight money for transportation through is not paid to the carrier that receives the goods, and though he is not shown to have any connection in business with other parties beyond his own line. Mushchamp v. The Lancaster and Preston Railway, 8 M. & W. 421; Watson v. The Ambergate, Nottingham and Boston Railway, 3 L. & E. 497; Collins v. The Bristol and Exeter Railway, 11 Exch. 790, 7 H. L. C. 194; Coxon v. The Great Western Railway, 5 Hurl. & N. 274. These and several other cases show that in England, after the fullest discussion in all the courts, the rule is firmly established that a carrier who receives goods marked for a place beyond his own line is *prima facie* bound to carry them as directed to their final destination, and it is there held that the contract in such case is entire, and with the first carrier alone; that until some connection in the business, which has the general nature, if not the technical character, of a partnership, appears between him and the subsequent carriers, no action can be maintained against them by the owner, though the goods were lost or damaged on their part of the route.

I have not met with an American case in which the rule has been pressed to the extent of holding that the owner cannot come on any carrier by whose default the loss or damage actually happened. There are, however, numerous authorities in the United States for the general rule of Muschamp v. The Railway, that the receipt of goods marked for a place beyond the line of the carrier who receives them implies a contract to carry them to their final destination, though no connection in business is shown with other carriers beyond, and though the price for transportation through is not paid in advance.

In Foy v. The Troy and Boston Railroad, 24 Barb. 382, the doctrine of the case is stated in the head note to be, that "where a railroad company receives for transportation property addressed to a person at a point beyond the terminus of the road, he will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee." The

court say: "It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington, or, having ascertained this, to determine at his peril which of said companies had been guilty of the negligence which resulted in the injury to his wagon." In *Schroeder v. The Hudson River Railroad*, 5 Duer, 55, the agent of the defendants gave the following receipt at New York: "Received of Schroeder six boxes—to be forwarded per Hudson River Railroad freight train to Chicago, Illinois;" and it was held that the defendants under this receipt were bound to transport the goods to Chicago. No connection in business with other carriers was relied on. In *Kyle v. The Laurens Railroad*, 10 Rich. (Law) 382, the rule of *Muschamp v. The Railway* was approved. O'NIEL, J., says: "The case of *Muschamp v. The Lancaster and Preston Junction Railway* states, I think, the true rule." The rule of *Muschamp v. The Railway* was approved and adopted in the *Central Railroad v. Copeland*, 24 Ill. 332, 76 Am. D. 749, in which it was held that "a railroad corporation selling tickets through over its own and other roads is liable for the safety of passengers and their baggage to the point of destination." The case was put on the same ground as when goods are received marked for a place beyond the line of the carrier that receives them. The court say: "We are inclined to yield to the force of the reasoning of the English courts on principles of public convenience, if no other, and to hold when a carrier receives goods to carry, marked for a particular place, he is bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for that loss."

(The court also discussed *The Central Railroad v. Johnson*, 34 Ill. 389; *Detroit and Milwaukee Railroad v. F. and M. Bank*, 20 Wis. 122; *Angle v. Mississippi and Missouri Railroad*, 9 Ia. 487; *St. John v. Van Santvoord*, 25 Wend. (N. Y.) 660; 6 Hill (N. Y.) 157.)

The American authorities above cited sustain the doctrine of *Muschamp v. The Railway*, that, when a carrier receives goods marked for a place beyond his own line, he is, *prima facie* and in absence of other evidence, bound by an implied contract to carry the goods to the place for which they are marked, though he has no connection in business beyond his own line, and though he does not receive pay for transportation through.

There is another class of American cases which hold that the mere receipt of goods marked for transportation beyond the line of the party that receives them is not evidence of a contract to carry beyond his own line, if he has no connection in business

with carriers beyond; but that, if several carriers associate in a continuous line, carry goods for one price through, and divide the freight money among them in an agreed ratio, though they may not be technically partners, but only *quasi* partners, yet, as to third persons who intrust goods to them for transportation, they are jointly liable for a loss that happens in any part of the continuous line, though the freight money is not paid to the first carrier on delivery of the goods to him.

In *Champion v. Bostwick*, 11 Wend. (N. Y.) 571, 18 Id. 175, 31 Am. D. 376, several proprietors of different sections in a connected line of stage coaches divided the receipts of the whole route in proportion to the miles run by each; and it was held that they were jointly liable as partners for an injury to a third person, not a passenger, caused by the negligence of one of them. It is to be observed, that in this case the receipts of the way as well as the through travel were brought into the account; and on this a distinction has been taken between that case and one where the receipts of the through travel only are divided; and for that reason it has been said that, in a case like the present, there is no partnership and no joint liability. But as to parties who deal with the through line, it is of no consequence how the other business is managed, or whether any other business is done by the associated carriers. At most, the distinction is merely technical and has no substance. Nor am I acquainted with any legal principle to prevent one engaged in a general business from having a partner in one distinct part of it, like the through business in this case, without bringing all his business of the same kind into the partnership account. I take it to be no uncommon thing for a trader to have a partner in his business done at one place, who has no concern in his business of the same kind transacted at other places; that attorneys form partnerships limited to certain parts of their business, and merchants, in the voyages, or in a single voyage, of one ship.

Hart v. The Rensselaer & Saratoga Railroad, 8 N. Y. 37, 59 Am. D. 447, is to the point that "where three separate railroad companies, owning distinct portions of a continuous railroad route between two termini, run their cars over the whole road, employing the same agents to sell passenger tickets, and receive luggage to be carried over the entire road, an action may be maintained against any one of them for loss of luggage received at one terminus to be carried over the whole road." SMITH, J., delivering the opinion of the court in *McDonald v. The Western Railroad*, 34 N. Y. 501, 502, says: "We may judicially take notice of the fact that the vast business of inland transportation of goods is carried on mainly

upon routes formed by successive lines belonging to different owners, each of whom carries the goods over his own line and delivers them to the next. Many of these routes extend over thousands of miles. Their proprietors unite and receive goods for transportation *upon the promise, express or implied*, that they shall be carried safely to the place of delivery. The owner has lost sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination."

In *Wibert v. The Erie Railroad*, 12 N. Y. 256, it was said, that, "where a carrier is in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there has been presumed; but where these operations are entirely disconnected, there is no partnership. In *Bradford v. The Railroad Company*, 7 Rich. (L) 201, it was held that "an advertisement of a through line and the course of the business is evidence to charge all the roads engaged in the continuous line of transportation as jointly liable for carriage through the whole route." REDFIELD, C. J., in delivering the opinion of the court in *The F. M. Bank v. The Transportation Company*, 23 Vt. 186, 56 Am. D. 68, speaking of *Weed v. The S. & S. Railroad*, 19 Wend. 534, says: "That case is readily reconciled with the general rule that such carrier is only bound to the end of his own route, by the consideration that in this case there was a *kind of partnership connection* between the first company and the other companies constituting the entire route, and also that the first carrier took pay and gave a ticket through, which is most relied on by the court; and in such cases where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to carry throughout the entire route." In a note to this case by REDFIELD, C. J., he says: "In that case (*Weed v. The Railroad*) the court seem to put the case more upon the fact of taking fare and giving a ticket through, which, in practice, is seldom or never done, except where there is a *quasi partnership* throughout the route." This would seem to be a strong authority that where there is a connected line of carriers, and a *quasi*, though it may not be technical and legal, partnership, they are liable jointly for carriage through the whole connected route.

(Omitting the discussion of *Burtis v. Buffalo and State Line Railroad*, 24 N. Y. 269; *Smith v. N. Y. C. Railroad*, 43 Barb. 225; *Cincinnati, H. & D. Railroad v. Spratt*, 2 Duval 4.)

In 2 Redfield on Railways, 104, the learned author sums up the result of the American cases on this particular point as follows: "The American cases upon the subject, with rare exceptions,

recognize the right of a railroad company to enter into special contracts to carry goods beyond the line of their road; and *where different roads are united in one continuous route*, such an undertaking, when goods are received and booked for any part of the line, is almost a matter of course." In the present case the defendants were united in a continuous line to New York; the goods were received *marked*, which must be equivalent to *booked*, for New York; and the case would seem to fall clearly within the rule laid down in Redfield as the result of the American authorities.

There is still another class of cases, in which it is held that the fact of a carrier's receiving pay for transportation to a place beyond his own line implies a contract to carry to that place. In the case of *Hyde v. The Trent & Mersey Navigation Company*, 5 T. R. 389, decided in 1793, the marginal note is as follows: "Common carriers from A to B charge and receive for cartage to the consignee's house at B from a warehouse there, where they usually unloaded, but which did not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, although they allow all the profits of the cartage to another person, and that circumstance were known to the consignee." The four judges delivered their opinions *seriatim*, and all agreed that the charge for cartage to the house of the consignee "put the case out of all doubt," and bound the carriers who made the charge to carry the goods to their final destination. In answer to the argument that the carriers acted as agents of the owner in forwarding the goods beyond their own line, Mr. Justice BULLER said: "According to the defendants' own argument great inconvenience would result to the public from adopting the other rule. According to their argument there must be two contracts, where goods are sent by coach or wagon. But I think the same argument tends to establish the necessity of three; one with the carrier, another with the innkeeper, and a third with the porter. But in fact there is but one contract; there is nothing like any contract or communication between any other person than the owner of the goods and the carrier. But I rely on the charge which the defendants compelled the plaintiff to pay before they would engage to deliver the goods. The different proprietors may divide the profits among themselves in any way they choose, but they cannot exonerate themselves from their liability to the owner of the goods." This case, coming before the agitation of these questions on the introduction of steam as a motive power, and decided on the general principle applicable to the liability of carriers at common law, is certainly of very great weight. It decides that when a carrier receives

goods to be transported beyond his own line, and takes pay for carrying them to their final destination, he agrees to do what he has been paid for doing; and it repudiates the fanciful theory of an agency for the owner to forward the goods, and in his behalf procure them to be carried by others.

In *Weed v. The Saratoga & Schenectady Railroad*, 19 Wend. 534, the plaintiff's agent took passage at Saratoga in the Saratoga and Schenectady railroad for Albany, and paid his fare to Albany. The route to Albany consisted of the defendants' and the Mohawk and Hudson River railroad. When the agent arrived at Albany his trunk, containing money of the plaintiff, was missing, and this action was brought to recover for the loss. One ground taken for the defendants was, that there was no evidence the trunk was lost on their road. There was no evidence of a contract to carry to Albany except such as was implied from the fact that the two roads made a continuous line to Albany, and the defendants took the trunk for carriage to Albany and received the pay for carrying through. It was held that the payment and receipt of fare through bound the defendants as carriers over the other road through the whole continuous route.

Wilcox v. Parmelee, 3 Sandf. 610, is an authority to the same point, that receiving pay for transportation to a place beyond the line of the carrier who receives it implies a contract to carry to that place. The court say: "Besides, there is a fixed sum which covers the whole charge; and it would be absurd to suppose that the defendant was to receive the whole sum for merely forwarding, that is, placing the goods on the vessels of some other party to be carried to their place of destination."

Van Santvoord v. St. John, 6 Hill, 157, cited for the defendants, recognizes the doctrine of *Weed v. The Railroad*. In his opinion for reversing the judgment of the supreme court the chancellor says: "In the case of *Weed v. The Railroad*, the two lines were connected together by an arrangement between themselves, and the agent of the defendant took the pay in advance for the conveyance of the plaintiff and his baggage the whole distance. Or, if no actual connection between the two lines was proved, it at least appeared that the defendant permitted its agent to hold it out as a carrier of passengers and their baggage for the whole distance, *by taking pay therefor*." It thus appears that in *Van Santvoord v. St. John*, as in *Hyde v. The Navigation Company*, taking pay for carriage to a place beyond the line of the party that takes it is regarded as decisive of an undertaking to carry to that place. *Quimby v. Vanderbilt*, 17 N. Y. 315, 72 Am. D. 469, is to the same point, that receiving pay for carriage through a continuous line imports a contract

to carry through; and in *Burtis v. The Buffalo & State Line Railroad*, 24 N. Y. 269, 278, SUTHERLAND, J., says: "It would appear to be settled by both the American and English cases that when from usage in the particular business, or *by receiving pay to the place* to which the goods are addressed, beyond the railway company's road, or from any other circumstance, it is to be presumed that the undertaking of the railway was to deliver at such place, they are responsible for the delivery of the goods at such place, and are liable if the goods are lost after leaving their road."

(Omitting discussion of *Choteaux v. Leach*, 18 Pa. St. 224; *Baltimore & Philadelphia Steamboat Co. v. Brown*, 54 Pa. St. 77; *Candee v. Pennsylvania Railroad*, 21 Wis. 582, 94 Am. D. 566; *Cary v. Cleveland and Toledo Railroad*, 29 Barb. 36; *Illinois Central Railroad Company v. Copeland*, 24 Ill. 332, 76 Am. D. 749; *Wheeler v. Railroad*, 31 Cal. 52, 89 Am. D. 147.)

In *Carter v. Peck*, 4 Sneed (Tenn.) 203, 67 Am. D. 604, the defendants received fare and gave a ticket to a point beyond their own line; it was held that they were liable for a detention beyond their own line. HARRIS, J., delivering the opinion of the court, says: "When the defendants received the plaintiff's money and gave him a through ticket, they thereby became bound for his transportation over the entire line. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that arrangement, nor was he bound to look to any person for the performance of the defendant's undertaking to any person but themselves."

Redfield (in *Red. of Railways*, 109) sums up the result of the authorities on this point as follows: "It has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular company, and giving a check or ticket through, does import an undertaking to carry through, and that this contract is binding on the company."

Then, again, there are American cases which maintain the doctrine that, though carriers are associated in a continuous line, and one of them, on receiving goods marked for transportation through, takes pay for transportation through, which by agreement of the parties to the continuous line is divided among them in a fixed proportion, yet, in the absence of a positive agreement, each carrier is liable for loss on his own line, and not for a loss on any other part of the connected line.

This appears to be the settled rule in Connecticut.

(The court cited *Hood v. New York & New Haven Railroad*, 22

Conn. 1; *Elmore v. Naugatuck Railroad*, 23 Conn. 457, 63 Am. D. 143; *Naugatuck Railroad v. Button Co.*, 24 Conn. 468; *Converse v. Norwich and Worcester Transportation Co.*, 33 Conn. 166. A single case in Maine—*Perkins v. P. S. & P. Railroad*, 47 Me. 573, was considered indecisive of this question; and in Massachusetts, *Nutting v. Connecticut River Railroad*, 1 Gray (Mass.) 502; *Darling v. Boston and Worcester Railroad*, 11 Allen (Mass.) 295, and *Goss v. N. Y., Providence and Boston Railroad*, 99 Mass. 220, were cited as settling the rule in Massachusetts to be that a corporation receiving goods directed to a point beyond its own line does not become responsible beyond its own line, unless it make a positive agreement extending its liability.)

It has been said that the English rule on this subject has not been generally adopted in this country. A review, however, of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the *American rule*. There is not only much confusion, but no little conflict, in the American authorities. A large proportion of them are not directly in point for the present case, which must be decided on the facts found by agreement of the parties.

The following are the facts and circumstances from which the contract between these parties must be inferred:

The three corporations were engaged as common carriers in the transportation of goods in a connected line between Nashua and New York, under an agreement among the parties to the connected line;

In the present instance, and generally under the agreement, one price was paid for transportation through;

The freight money was divided among the parties to the connected line in proportions fixed by their agreement;

The goods were received by the defendants for transportation on the connected line marked for New York;

The legal inference from the general statement of the agreement is, that the parties to the continuous line were bound by their mutual contract to take from each other and carry through goods, so marked, that might be received by any one of them;

The price for transportation to New York was paid to the defendants, when they received the goods.

The American authorities are comparatively few, which hold that when all these circumstances concur, the carrier who receives the goods is not bound, by an implied agreement, to carry them, or see that they are carried, over the connected line to their final destination. I do not find that the decisions in any of the states

sustain this defense. except in Connecticut, Maine and Massachusetts.

With regard to the cases in Connecticut, it cannot imply any want of the respect due to the courts of that state, if I say that for two reasons their cases on this point are not entitled to all the deference that is paid to their decisions on other subjects. In the first place, it is held there that railroad corporations have no corporate authority to contract for the transportation of goods or passengers beyond their own lines; a doctrine rejected everywhere else.

(The court also pointed out that the Connecticut decisions were rendered by three judges against two.)

But in Massachusetts the court, in a series of decisions, have established the rule that a carrier, though associated with others in a connected line of transportation, is not liable for a loss happening beyond his own line without a positive agreement to that effect; and this rule is applied to the baggage of passengers, and the undertaking of express companies that receive goods for transportation beyond their own lines. The fact that, notwithstanding the earlier decisions, suits have continued to be brought in that commonwealth against parties that have received goods to be transported on continuous lines for losses happening beyond their own lines, might seem to suggest a suspicion that the profession and the public had not readily acquiesced in the rule as there laid down; but the court have adhered firmly to the rule, and in some of the later cases have apparently declined to enter on the discussion of the question, treating it as finally settled; and we must, therefore, consider the high authority of that court as against the right of the plaintiffs to recover in this action. So far, however, as that court may be understood to have established the rule, that to bind a railroad for transportation beyond its own line there must be an express and positive agreement between the railroad and the owner of the goods, and that such an undertaking is not to be implied from facts such as are found in this case, the current of American authority, to say nothing of the English, appears to be strong the other way. Excepting the cases in Connecticut and Maine, which, when examined, do not, I think, give the Massachusetts doctrine any very strong support, the authorities in other states, though they differ much in other particulars, generally agree in this, that where, as in the present case, there is a continuous line of different carriers united by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the parties receiving goods to be transported on the

continuous line, marked for any place in it, and on receiving the goods takes pay for transporting them to that place, the party so receiving the goods and the pay for transportation, is *prima facie* bound by an implied agreement to carry the goods, or see that they are carried, to the place for which they are marked, and is liable for a loss happening on any part of the connected line.

If the case were to be considered on authority only, we should feel bound to decide for the plaintiffs, inasmuch as we find the weight of authority to preponderate heavily in their favor; and taking general principles and reasons of convenience and public policy for our guide, we are led to the same conclusion.

In the view which the plaintiffs ask us to take of this case, when the goods were received by the defendants, marked for transportation to New York, and the price paid to the defendants for transportation through on the continuous line, the plaintiffs made one contract with the defendants, by which the defendants agreed, either as joint carriers with the other associated parties, or as undertaking for them to carry the goods through for the price paid, as goods were carried in the usual course of the business on that line. In that view the plaintiffs would have nothing further to do in the matter. Every thing else was provided for by the agreement among the associated carriers; for by their agreement the defendants were bound to transport, and the successive carriers would be bound to take and carry, the goods from each other to their final destination. The price through was paid, and belonged to the different carriers in proportions fixed by their agreement, and this theory would agree exactly with the facts; for the plaintiffs in fact made but one agreement with one party to have the goods carried for one price to New York. No further stipulation or direction on the part of the plaintiffs was necessary, and none was ever in fact given by owners of goods who put them in the course of transportation, as these were put, in the continuous line.

According to the defendants' theory of the case, when the plaintiffs delivered the goods marked for New York, and the defendants received them and took pay for transportation through, no contract was made with any party to carry the goods through; but the contract then made by the defendants was to carry the goods to the next carriers on the connected line with the surplus money, and, as agents of the plaintiffs, make a contract if they could with the next carriers to take the goods and the money, and carry them on in the same way through successive agencies for the plaintiff to their final destination. If these agents should consent to act for the plaintiffs, and be able to negotiate bargains

with the other carriers for transportation through, the goods would go to New York as was intended; but they would go under three separate contracts, made at different times through this imaginary agency, with three different and independent parties.

The first objection to the defendants' theory of this transaction is, that it is contrary to the fact. The owner of goods in a case like this does not in fact appoint or employ the successive carriers in the continuous line as his agents to hold his money for him, and as his agents carry it forward and contract in his behalf with the other roads for further transportation. He makes but one contract for one price; he pays the price, and the money he has paid does not belong to him, but to the associated carriers, in proportions fixed by their agreement. He does not inquire, nor is he interested to know, how they divide the money. The contract is entire and complete when he pays the price for transportation through, and every thing to be done afterward is regulated by the standing agreement among the associated carriers. He has no control over them as his agents; he does not and cannot intermeddle with the manner in which they do the business or dispose of the money that he has paid for the carriage of his goods.

Let us see what are some of the consequences that would follow, if both parties in a case like this should act on the defendants' view of their legal rights. Suppose in this case the goods had been carried through to New York, and the defendants had not paid to the next carriers the proportion of the freight money which belonged to the other carriers; and then suppose that the Norwich and Worcester railroad should sue the plaintiffs for carrying the goods over their road. It would avail the plaintiffs nothing to say that they had paid the freight through when the goods were received at this end of the route. The ready answer would be: "To be sure, you put money into the hands of your agents, the Worcester and Nashua railroad, to pay us, but they neglected their duty; your money is still in their hands, and we are not paid." It is, however, quite clear, that the money received by the defendants for transportation through on the connected line would be held by them for all the parties to the line; they would be bound to account for it under their agreement as one partner accounts with his fellows for money received on partnership account. Then, if the plaintiffs should undertake to pay the different carriers, how are they to know the share of each? The proportions of the freight money belonging to them respectively are regulated by a private agreement of which the plaintiffs know nothing, and of which, in the way the business is actually conducted, they have no need to be informed. If the

plaintiffs had proposed when they delivered the goods to pay the Worcester and Nashua road their proportion of the freight money, and afterward to pay the other carriers their respective shares, they probably would have found nobody to tell them what the different shares were, or to receive the goods to be carried on such terms. In truth, the connected line transacts business as one joint concern, and the business cannot be transacted otherwise with convenience either to the carriers or the owners of the goods.

Then if we look to the remedy of the associated carriers for the recovery of the freight money, each, on the theory of the defendants, must bring a separate suit on the separate contract for his proportion of the money. We have had occasion to learn, from the facts stated in another case now pending before us, that there is a connected line, consisting of six or seven different railways, extending from Ogdensburgh in New York, through Vermont and New Hampshire, to Boston in Massachusetts, in which one price is paid for transportation through, and the money divided by a standing agreement, as in this case. If goods are carried through on this route, and there are six or seven different contracts, one with each road, then each road must bring a separate action for its share of the freight money. If it should be said that the remedy of the roads is to retain the goods at the end of the route till the whole price for transportation through is paid, this, in the first place, would show that these roads are so combined that, for their own purposes, they are a unit, while they insist that they are wholly separate and independent when the owner seeks redress for the loss of his goods. And then again, if the roads act separately, and are not jointly interested in the business of the connected line, when one of the roads parts with the possession of goods by delivery to another, it loses its lien for the freight money, and cannot transfer it to another independent carrier. Angell on Carriers, 357, 359, 609. This is not at all like the maritime lien, when a voyage is broken up and the cargo is put on board another vessel to be carried to the port of destination. There the lien on the cargo for the whole freight is transferred to the second vessel, which completes the transportation under one contract.

The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased, and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through, and dividing it among themselves by mutual agreement. They act to-

gether for all practical purposes, so far as their own interests are concerned, as one united and joint association. In managing and controlling the business on their lines, they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits, that happen in any part of their route. If, by their agreement, each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route.

They undertake the business of common carriers, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental losses, must be applied to these new methods of transacting the same business; and there is certainly nothing in the present condition of the business which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines—the increased risk of loss and damage from the immense distances over which they carry goods—the fact that where goods are once intrusted to carriers on these long routes, they are placed beyond all control and supervision of the owners,—are cogent reasons for holding those who associate in these connected lines to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law.

What, then, is the situation of the owner, whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damage may have happened? In the first place, he must set about learning where his loss happened. This would often be difficult, and sometimes quite impossible. Suppose an invoice of flour, shipped in good order at Ogdensburgh, were found, on arrival at Boston, to have been damaged somewhere on the route; or suppose a trunk, checked at Boston for Chicago, was broken open and plundered before it reached Chicago, what would the owner's chance be worth of

finding out in what particular part of the route the damage happened? He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants. The forlorn condition of the owner in such a case is put in a strong light by WAITE, C. J., in his dissenting opinion, *Elmore v. The Naugatuck Railroad*, 23 Conn. 457, 63 Am. D. 143, where he says: "A merchant residing in Cleveland, Toledo or Chicago, purchases goods in the city of New York, which he wishes to send to his place of business. He enters into a contract with a railroad company for their transportation, not to any given point on the route, but for the whole distance. He delivers the goods to the company, and they are taken and locked up in freight cars. He does not accompany them, and often sees and hears nothing more of them until they are delivered to him at their place of destination. The cars in which they are placed are often run over roads belonging to different companies, to save trouble and expense of change of cars. If the goods are lost or damaged on the route, he ordinarily has no means of determining where or in whose custody the injury occurred. The trouble and expense of ascertaining that fact in many cases would amount to more than the whole damage. As a prudent, cautious man, he would be unwilling to intrust his goods to the custody of others, unless he could find some person or company that would be responsible for their safe delivery." The remarks of SMITH, J. (34 N. Y. 501), before cited, are of the same import, showing the difficulties and embarrassments of the owner, if he can only resort for compensation to the carrier in the connected line on whose part of the route the damage happened.

A rule which throws such difficulties in the way of the owner who seeks to recover of common carriers for the loss of his goods, I cannot but regard as a wide departure from the general doctrine of the common law on this subject; and nothing is plainer than the duty of courts to apply the general principles of the common law to the new circumstances which are introduced by changes in the manner of transacting any business.

Few things are of greater importance to the whole country than the cheap, convenient and safe transportation of goods be-

tween distant points. Vast sums of money are expended to promote this object. The business is already immense and constantly increasing. Most of the business is done on connecting lines of railroads and steamboats, and these by continuous lines have a practical monopoly of the business on their respective roads. The owner of goods must intrust them to these associated carriers; they cannot be carried in any other way. Not only those who are engaged directly in carrying and sending goods are interested in this subject; all who produce and all who consume are interested that goods should be carried as cheaply, as conveniently and as safely as possible. Public policy and the public interest concur with the general maxim of the law, that those who transact this great business should be held to a rule which shall give a ready and effectual remedy to the owner whose goods have been lost or damaged in any part of these connected lines of transportation.

There is a perplexing diversity of decision on this subject in the different tribunals of this country. For instance, by the law of New York, as we understand it to be established by the construction which the courts have given to their statute, if goods are received in that state for transportation through on a connected line of railroads, the road that receives the goods is liable for loss or damage happening in any part of the connected line, though beyond the limits of the state. *Burtis v. The Buffalo & State Line Railroad, qua supra*. As has before been mentioned, there is a connected line of six or seven railroads extending from Ogdensburgh to Boston. If goods are received by the Ogdensburgh railroad for transportation to Boston, and are lost or damaged on any part of the line, say on the Lowell railroad, the Ogdensburgh railroad is liable for the loss. But if merchandise is received at Boston by the Lowell railroad for transportation to Ogdensburgh over the same connected line of railroads associated under the same agreement, the owner would be left to find out, if he could, on which of the six or seven connected roads his goods were lost or damaged, and could claim for his loss of that road alone. There would seem to be no remedy for this confusion and conflict of decisions unless the national legislature can provide one under the power given by the constitution to regulate commerce.

I come to the conclusion that, on the case stated, the plaintiffs are entitled to recover; and such is the unanimous opinion of the court.

125. QUIMBY V. VANDERBILT,

17 N. Y. 306; 72 Am. D. 469. 1858.

Action on a contract to carry defendant from New York to San Francisco *via* defendant's steamer to the Isthmus of Panama, thence by Accessory Transit Co.'s conveyance to the Pacific, and to San Francisco by Pacific steamers. One agent acted for the three lines, but sold three separate tickets, and accounted separately to the proprietors of each line for the tickets sold on that line. Plaintiff was safely carried to the isthmus, but was not promptly carried across and in consequence missed the Pacific steamer. The jury found that defendant had made a through contract and gave verdict for plaintiff.

By Court, DENIO, J. The plaintiff relies upon an express contract by which, as he alleges, the defendant engaged to cause him to be carried from New York to San Francisco; and the single question of law involved in the case is whether there was evidence of such a contract proper to be submitted to the jury. If it should be conceded that there was no such connection between the three lines of transportation as would entitle the defendant, as the representative of the whole, to contract in their behalf for the carriage of persons and property the entire distance from New York to California, it was yet quite competent for him to bind himself to the plaintiff by an express contract, not only to carry him over his own proper portion of the line, but that the other transportation companies should successively take him up upon his arrival at the commencement of their respective routes, and carry him over the same until he should arrive at his destination at San Francisco. The English courts hold that where property is embarked upon a railroad or other line of transportation, addressed to a place beyond the terminus of the line, but which may be reached by other lines of carriage running in connection with it, a contract arises between the first-mentioned company and the owner of the property that it shall be carried to its place of destination: *Muschamp v. Lancaster and Preston Railway Company*, 8 Mee. & W. 421; *Watson v. Ambergate etc. Railway Company*, 3 Eng. L. & Eq. 497; and this court has determined that the agent of a railway company may bind his principals by a contract for carriage over other roads running in connection with his own: *Hart v. Rensselaer and Saratoga Railroad Company*, 8 N. Y. 37, 59 Am. Dec. 447. The late court of errors, in my opinion very wisely, limited the English rule above mentioned, by holding that evidence was

admissible to show that by the course of business a transportation line receiving property without any express contract, undertook only to carry it over its own line, and then place it in the hands of the carriers over the next route, and that it discharged its obligation to the owners by delivering it to a responsible company next in order in its passage to the place of destination: *Van Santvoord v. St. John*, 6 Hill, 157. All the cases assume that the company to which the goods are delivered may lawfully contract for the performance of the other lines running in connection with its own, as well as for its proper route; and there is no difference in principle, in this respect, between contracts for the carriage of persons and for the transportation of property.

But the defendant's counsel contends that the tickets which the plaintiff received for the passage over the several routes are, in themselves, written evidence of the bargains by which he engaged his passage, and that he is precluded from contradicting them by parol testimony of an entire contract with the defendant. We do not think this a sound position. The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage-money; and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board. They are quite consistent with a more special bargain. Being the usual permits which were issued for the guidance of the masters of the vessels and the conductors of the carriages, they would necessarily be given to the passenger to facilitate the transaction of the business, whatever the nature of his arrangement for passage may have been. Their character as mere tokens is shown by the fact that the defendant received them in large numbers of the Transit company, not as an agent of that company for the purpose of making bargains in its behalf with others, but to furnish them to persons with whom he expected to deal on his own account. In *Hart v. Rensselaer and Saratoga Railroad Company*, just referred to, the plaintiff had separate tickets for each of the roads over which she traveled, but she was permitted to recover against one of the companies, though unable to show that her baggage was lost on the route of that company. We do not say that the receiving of separate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold that it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.

There was positive evidence of a verbal contract between the

plaintiff and Allen for carrying the former from New York to San Francisco. The plaintiff applied at the office to obtain such passage, and he was promised it for two hundred and fifty dollars. The tickets were then given him to secure his admission to the different vehicles of the line. In this Allen professed to act as the agent or clerk of some one. So far as the steamships on the Atlantic were concerned, he was the agent of the defendant, and no question is made but that he was authorized to bind the defendant thus far. It is equally clear to my mind that he was authorized to bind him by contracts for carrying passengers across the isthmus. The Transit company did not, as a general thing, sell any tickets to travelers; nor did they make any contracts for passage except with the defendant. To him they sold tickets, in the nature of permits for passage over their route, in such quantities as he chose to purchase. It is proved that neither he nor Allen were agents for the Transit company. When he dealt with a traveler, therefore, he bargained on his own account, and not on behalf of the Transit company. He might have charged more or less than he paid the company. It was certainly possible for him to dispose of one of these permits by an arrangement with the passenger so special that the latter should have no recourse to him; but if he engaged in terms that the purchaser should be carried across the isthmus, and gave him one of the Transit company's tickets to show his title to be admitted on board their boats and carriages, he was the principal in that contract, and must answer for its breach. He placed these tickets in the hands of Allen, who was accustomed to deliver them to passengers in connection with such contracts as the one he made with the plaintiff. Allen admitted on his examination that he charged the gross sum of two hundred and fifty dollars for the entire passage, without any specification of the amount belonging to the separate branches of the line; and there is not the slightest evidence that on any occasion he sold the tickets to be taken at the risk of the passenger, or in connection with any arrangement except such as I have mentioned. The facts that the defendant purchased the tickets of the Transit company; that he placed them in the hands of his agent Allen for delivery to passengers; that the latter was accustomed to dispose of them in connection with contracts for passage over the entire route; and that he transacted the business in an office occupied also by the defendant, and acted under his general direction—were sufficient *prima facie* to charge the defendant as principal in these contracts.

As the detention, which prevented the plaintiff from reaching

the steamship Independence before she sailed, occurred upon the isthmus, the defendant is chargeable in this action when it is shown that such detention was a breach of his contract, even though it should be held that the plaintiff contracted with other parties for his passage upon the Pacific coast. But I think there was sufficient evidence to enable the jury to find that the defendant was the principal in the contract which Allen made with the plaintiff for the entire passage. The terms of the card which was given to the plaintiff when he received his ticket, and of the advertisement which was posted at the door of the office, which the plaintiff read when he went to secure his passage, looked to contracts for the whole distance. The defendant's connection with the office and with Allen was sufficient *prima facie* to charge him with a knowledge of the contents of these papers, and he is to be looked upon as their author. Being known to both parties to the contract for passage, they afford the means of ascertaining what that contract was if it were otherwise equivocal. If we add to this evidence the fact that the defendant was the owner of a moiety of two of the steamships which ran on the Pacific side, and that he was a party to the arrangement by which the Independence, owned substantially by the Schuylers, was employed in that navigation in connection with the other routes, a case was made out which was not only suitable for the consideration of the jury, but which, in our opinion, fully warranted the verdict which they gave.

The judgment of the court of common pleas should be affirmed.
All the judges concurred.

126. CONDON V. MARQUETTE, HOUGHTON & ONTONAGON RAILROAD CO.,

55 Mich. 218; 54 Am. R. 367. 1884.

Action for value of freight.

Plaintiff shipped goods from New York over several connecting lines to himself at Hancock, Michigan. They were delivered to defendant March 12th, 1883, and carried to its terminus at L'Anse next day. They were there stored in defendant's warehouse awaiting their further carriage by the L'Anse and Houghton Overland Transportation Co., as there was no railroad beyond L'Anse. The Transportation Co. was accustomed to examine the books of defendant to ascertain what goods were to be taken by it, and to transport from the warehouse such goods to Hancock or other places in sleighs or other vehicles.

March 20th, before the Transportation Co. had called for the goods, they were destroyed by fire. No notice had been given by defendant to plaintiff or to the Transportation Co. The goods had simply remained in the warehouse. Plaintiff claimed of defendant their value, and that being refused he brought this suit. The court below instructed that if defendants received the goods they remained common carriers during the transportation of the goods, and after their arrival for such reasonable time as, according to the usual course of business with the Transportation Co., would enable defendant to deliver the goods to that company, and no delay of the Transportation Co. would exonerate defendant from this liability. Its duty was to deliver or offer to deliver the goods to the Transportation Co., and if they were not so delivered or offered plaintiff was entitled to recover. Judgment for plaintiff, and defendant brings error.

COOLEY, C. J. (After stating the facts.) The question which the instruction presents is one upon which the authorities are somewhat divided. It received careful attention at the hands of the New York Court of Appeals in *McDonald v. Western Railroad Corporation*, 34 N. Y. 497, where several opinions were delivered. The facts upon which the decision was to be made were in all respects similar to those now before us, and the judges were unanimous in holding that the railroad company was liable. WRIGHT, J., said: "The goods had been received by the defendants at Chatham, to be transported to Binghamton by way of the Erie and Chenango canal. Their obligation therefore was to carry the goods safely to the end of their road and deliver them to the next carrier on the route beyond. A carrier in such case does not release himself from liability by simply unloading the goods at the end of his route, and placing them in his own storehouse, without delivery or notice to, or any attempt to deliver to, the next carrier." HUNT, J., in a concurring opinion, referring to *Ladue v. Griffith*, 25 N. Y. 364, 82 Am. D. 360, as a somewhat similar case, said: "The defendants in the present case did no act indicating that they had renounced the liability of a carrier. They simply unloaded and deposited goods in their warehouse. Had this deposit been made in the warehouse of a company engaged in canal transportation westwardly, it would have been an act of great significance. But here the fact is expressly found that it was the custom of the further carrier to take the goods from the defendant's depot. The liability of the further carrier did not commence until he removed the goods from the defendants' warehouse. The deposit

therefore by the defendants in their own warehouse did not afford any evidence of a renunciation of the carrier's liability." And he added that the deposit of the goods in the warehouse was to be considered a mere accessory to the carriage by defendant, and their liability as carrier was therefore unbroken.

This decision was approved as sound and followed as authority in *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152, and it is undoubtedly the settled law of New York at this time. The same doctrine was laid down in *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630, in a forcible opinion by DIXON, C. J., and also in *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376, 18 Am. Rep. 340, which cites with approval the case in 34 N. Y. Reports. The like doctrine also appears to be recognized in *Erie Railroad Co. v. Lockwood*, 28 Ohio St. 358; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; and *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. 253. It was also affirmed in *Michigan Cent. R. Co. v. Manufacturing Co.*, 16 Wall 318. This last case expresses views not in harmony with the opinion of this court respecting a certain clause in the charter of the Michigan Central Railroad Company as expressed in *Michigan Central R. Co. v. Hale*, 6 Mich. 243, and *Same Company v. Lantz*, 32 Mich. 503; yet as the question now under consideration was considered and decided by the court upon common-law principles, the conflict of views on the question of construction is of no importance in this case.

We think these cases lay down a rule which is just to shippers of goods, and not unreasonably burdensome to carriers. The shipper delivers his goods to a carrier, who becomes insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier; and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which is burdensome to the carriers; for this is the customary method in which the business is done; and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence.

The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to

§§ 126, 127 TERMINATION OF CARRIER'S RELATION.

ascertain from the books of the other what goods were ready for reception and further carriage. This, as between themselves, was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not by means of it relieve itself of any liability which duty to the plaintiff imposed. And it was clearly its duty to the plaintiff, as we think, to relieve itself of the responsibility of the goods remaining for an unreasonable time in its warehouse; and to do this, it was necessary that the responsibility be transferred to the carrier next in line. But the mere permission to inspect its books and take whatever was ready for carriage would not do this; there should have been distinct notice which would apprise the other carrier that defendant expected the removal of the goods.

In this case there were no facts indicating a renunciation, as to these goods, of the liability of common carrier by the defendant, or that it was supposed by the agents of the defendant that that character had been exchanged for any other. If it ever was, it must have been at the moment the goods were received; for nothing took place afterward to change the relation of the defendant to the goods until the fire took place. But we are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think that is the law, or that it ought to be.

The judgment should be affirmed.

127. MOORE V. NEW YORK, NEW HAVEN & HARTFORD
 RAILROAD CO.,

173 Mass. 335; 53 N. E. R. 816; 73 Am. St. R. 298. 1899.

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tennessee, to Boston. The passage was over six connecting railroads; it does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called presumption was started and justified as a true presumption of fact, that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies

upon a license to show it: 1 Greenleaf on Evidence, sec. 79; Pub. Stats., c. 214, sec. 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (Farmington Mercantile Co. v. Chicago etc. R. R. Co., 166 Mass. 154, 44 N. E. R. 131), it is almost necessary to call on the last carrier to explain the loss, if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists: Smith v. New York Cent. R. R. Co., 43 Barb. 225, 228, 229; affirmed, 41 N. Y. 620; Laughlin v. Chicago etc. Ry. Co., 28 Wis. 204, 9 Am. Rep. 493; Memphis etc. R. R. Co. v. Holloway, 9 Baxt. 188, 191; Dixon v. Richmond etc. R. R. Co., 74 N. C. 538; Leo v. St. Paul etc. Ry. Co., 30 Minn. 438; 15 N. W. R. 872; Montgomery etc. Ry. Co. v. Culver, 75 Ala. 587, 51 Am. R. 483; Beard v. Illinois Cent. Ry. Co., 79 Iowa, 518, 44 N. W. R. 800, 18 Am. St. R. 381; Savannah etc. Ry. Co. v. Harris, 26 Fla. 148, 7 So. R. 544, 23 Am. St. R. 551; Faison v. Alabama etc. Ry. Co., 69 Miss. 569, 13 So. R. 37, 30 Am. St. R. 577; Forrester v. Georgia R. R. etc. Co., 92 Ga. 699, 19 S. E. R. 811. In the opinion of the court, the weight of argument and authority is on that side. Mr. Justice Lathrop and I have not been able to free our minds from doubt because we are not fully satisfied that the court has not committed itself to a different doctrine. Still, it has not dealt with it in terms. In Darling v. Boston etc. R. R. Co., 11 Allen, 295, the only question discussed was a question of contract. In Swetland v. Boston etc. R. R. Co., 102 Mass. 276, the question was as to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases.

Judgment for plaintiff.

128. ALLEN V. MAINE CENTRAL RAILROAD CO.,

79 Me. 327; 9 Atl. R. 895; 1 Am. St. R. 310. 1887.

By Court, EMERY, J. The only mooted question in this case is, whether the plaintiffs effectually exercised against the carrier their clear right of stopping the goods *in transitu*.

The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company (the carrier) to stop and return the goods. The defendant company contend the notice

was insufficient, because there was no statement of the nature or basis of the claim to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and by such a notice as was given here is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In Benjamin on Sales, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, etc., it is also stated that "all that is required is some act or declaration of the vendor countermanding the delivery." Brewer, J., in *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84, said: "A notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In *Clemintson v. Grand Trunk R'y Co.*, 42 U. C. Q. B. 263, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

The defendant further contends that the plaintiff's omission to afterward prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man, against whom conflicting claims are made. If, as is alleged here, the circumstances are such that he cannot compel them to interplead, he must inquire for himself, and resist or yield at his peril.

It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith toward the carrier. He should, if requested, furnish him, in due time with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company, having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for \$176.41, with interest from the date of the writ.

PART IV

OF QUASI-BAILEES

CHAPTER XIV.

OF CARRIERS OF PASSENGERS.

129. HOAR V. MAINE CENTRAL RAILROAD CO.,

70 Me. 65; 35 Am. R. 299. 1879.

APPLETON, C. J. The material and substantive allegations in the several counts in the plaintiff's writs are that the defendants are common carriers of passengers between Waterville and West Waterville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter, a foreman of a section, in their employ and trusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate while riding was run over by one of the defendant's engines to which a paymaster's car was attached, and injured so that he died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care. To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants for injuries resulting from want of due care in the selection of fellow-servants, but if duly selected they do not guarantee against their negligence. *Blake v. M. C. R. R. Co.*, 70 Me. 60, 35 Am. R. 297. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place him in a different position, so far as relates to his right to protection from neglect, from a pay passenger—if he is to be regarded as a passenger to be carried by the defendants. *Phil. & Read R. R. Co. v. Derby*, 14 How. 468; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Whart. on Neg.* § 355.

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though common carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by their hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public, that they were common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should apply. Were, then, the defendants bound to carry on their hand-cars any one asking to be so conveyed? Assuredly not.

In *Graham v. Toronto, Grey & Bruce Railway Co.*, 23 Up. Can. (C. P.) 541, the defendants agreed, with a contractor for the construction of their railway, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks Haggerty, C. J., "that the defendant's engine-driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objection from him, gets upon the cart. It

breaks down, or by careless driving runs against another vehicle, or a lamp-post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing the work at his house drive in his cart, make any difference. * * * It could never be, I think, in the reasonable expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in *Sheerman v. Toronto, Grey & Bruce Railway Co.*, 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes WILSON, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability, must be adjudged bad. *Eaton v. Delaware, L. & W. R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Union Pacif. R. R. Co. v. Nichols*, 8 Kans. 505; 12 Am. Rep. 475; in *Dunn v. Grand Trunk Ry. Co.*, 58 Me. 187, 4 Am. Rep. 267, the plaintiff was riding in a saloon car attached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the

plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

130. BRICKER V. PHILADELPHIA AND READING
RAILROAD CO.,

132 Pa. St 1; 18 Atl. R. 983; 19 Am. St. R. 585. 1890.

Trespass, by Elizabeth S. Bricker to recover damages for the death of her husband in a collision. A few moments before, feeling ill, he had gone into the mail car, where the postal clerk gave him some medicine. The conductor had not asked for his ticket, but a ticket good for the transportation was found on the person of the deceased. Appeal from a judgment of nonsuit.

McCOLLUM, J. There is no evidence in this case which warrants an inference that the defendant company accepted Bricker as a passenger on its train from Port Clinton to Tamaqua. He entered a car which he knew was not provided for the transportation of passengers. He was on the train without the knowledge or consent of the company, and in a place where its employees, in the discharge of their ordinary duties, would not discover him. It was a place devoted exclusively to the railway mail service, and in charge of one of its employees. He was confronted by an order of the superintendent of that service, forbidding him to remain there. He was not there for any purpose which related to a duty of the company in the transportation of its passengers or their baggage.

Upon these undisputed facts appearing in the plaintiff's evidence, no contract for safe carriage existed between the company and the deceased. A passenger, in the legal sense of the word, is "one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor": *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256. In *Wharton on Negligence*, sec. 354, the undertaking of the carrier is

thus defined: "A carrier, in undertaking to carry passengers safely, undertakes to carry them safely if they place themselves under his direction in particular places prescribed for the purpose; and he will not be held liable for damages accruing to an interloper who, unnoticed by him, hides in the crevices of a locomotive or in the hold of a ship. In Patterson's Railway Accident Law, sec. 214, it is stated "that the existence of the relation of carrier and passenger is dependent upon the making of a contract of carriage. From this it follows that railways are not liable to persons who have not been accepted as passengers, and the intention of the person to pay his fare, and his good faith, are immaterial, where there has been no contract, express or implied, on the part of the railway."

These quotations from standard text-books correctly state the law on the subject to which they refer. As Bricker was not a passenger, and was on the train without the consent, express or implied, of the company, it owed him no duty, and the nonsuit was rightly ordered. In this view of the case, it is unnecessary to consider whether, if he had been accepted as a passenger, he was guilty of negligence which contributed to the injury he received, and which caused his death.

Judgment affirmed.

131. WARREN V. FITCHBURG RAILROAD CO.,

8 Allen (Mass.) 227; 85 Am. D. 700. 1864.

Tort for damages caused by being run over by defendant's engine. The engineer testified that his train was going about 9 or 10 miles an hour, and that the whistle was blown and bell rung as usual when approaching a station. Plaintiff testified that he looked to see where he should take his train, which was coming in an opposite direction on another track, that he saw the train that injured him only 20 or 30 feet away and at the same instant heard its whistle. Further facts appear in the opinion. Verdict for plaintiff in \$5,750 damages.

By Court, HOAR, J. The plaintiff could not recover unless he was himself using due care at the time when he received the injury, even if the carelessness of the defendants occasioned it. And the burden of proof was upon him to show that he used this care. So much is clearly settled.

In several recent cases it has been held that if the whole evidence introduced by the plaintiff has no tendency to show care

on his part, but, on the contrary, shows that he was careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant: *Lucas v. New Bedford and Taunton R. R.*, 6 Gray (Mass.) 64, 66 Am. D. 406; *Gahagan v. Boston and Lowell R. R.*, 1 Allen (Mass.) 187, 79 Am. D. 724; *Todd v. Old Colony and Fall River R. R.*, 3 Allen (Mass.) 18, 80 Am. D. 49; *Wilson v. City of Charlestown*, 8 Allen (Mass.) 137, 85 Am. D. 693.

We should have no doubt, if the evidence in the case at bar had disclosed nothing more than that the plaintiff had crossed a railroad track, with due notice of its existence, and without looking to see whether a train were approaching, that the principle of those cases would be applicable to this. Such evidence, with nothing to explain or qualify it, would not have shown the exercise of due care, but the contrary.

But we are of opinion that the other facts which appeared in evidence had a very important bearing upon the propriety of the plaintiff's conduct, and that all the circumstances taken together presented a case which was proper to be submitted to the jury, and which the court could not rightfully withdraw from their consideration.

It was shown that the plaintiff had purchased his ticket entitling him to a passage to Boston, and was waiting in the passenger station for the arrival of the train; that when the whistle of the approaching train was heard, the station agent employed by the defendants said to him: "The train is coming; we will cross over." Upon receiving this information and direction, the plaintiff followed the station agent from the room across toward the train, which had arrived and stopped before he came out on the platform. The path by which he went to the train was somewhat oblique, so that the engine which struck him came in a direction partially behind him. Whether, in this condition of things, in his anxiety seasonably to reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification; whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself under the charge of the defendants' agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury, and not for the court. They were submitted to the jury, with instructions which were appropriate and sufficient, and to which, in the opinion of this court, the defendants had no just ground of exception.

The next exception taken was to the instruction given to the

jury, "that a person who had purchased a ticket entitling him to a passage on a particular train was to be considered, while passing from the office or place of business where the purchase was made to the train, to take his seat in one of the cars of which it consists, as a passenger; and that the defendants were bound to exercise the same degree of care in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle or obstruction which would unreasonably impede him or expose him to harm or injury while proceeding to take his seat in the cars, as in the subsequent transportation and carriage of him." We think this instruction, though not strictly correct as a general proposition applicable to all cases of the kind, was not erroneous, if taken with the qualifications which the particular case afforded, and which must have been obviously understood as included in it. As a general statement it was too broad, because a passenger may buy his ticket at an office which is not in the same town, or even in the same state, in which he intends to take the cars. The railroad company have no control over his movements, and he does not, by the purchase of a ticket, put himself under their charge. But if he is "passing from the office or place of business where the purchase was made to the train, to take his seat in the cars," on the premises belonging to the company, connected with the railroad, and under the direction of the company's agents, given to him as a passenger with whom the company have made the contract for conveyance which the purchase of the ticket creates, as was the case with the plaintiff, we think he is to be considered as a passenger, and entitled to the rights of a passenger while so passing. It is the duty of the railroad company to afford to the passengers whom they undertake to carry in their cars a reasonable and safe opportunity to pass from the room or building in which they receive passengers for transportation, to the cars, when the proper time comes for them to take their seats. The purchasers of tickets are bound to comply with all reasonable rules and orders of the company or their agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board the train, and while the transit continues. The instruction to the jury, therefore, seems to have been sufficiently adapted to the circumstances of the case, and this exception cannot be sustained.

The remaining exception was taken to the terms in which the judge who presided at the trial defined the degree of care which the law imposes upon carriers of passengers for hire. The language used was precisely that in which the rule of law was laid

down by this court in the case of *Ingalls v. Bills*, 9 Met. (Mass.) 1, 43 Am. D., 346. Upon a full examination and review of the English and American cases, Mr. Justice Hubbard, in that case, declared the result to be "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against"; and the change of phraseology in the case at bar was only that required to adapt this rule to the circumstances of the carriage of passengers by railroad.

The rule in its full extent has been recognized and affirmed in several subsequent decisions: *McElroy v. Nashua and Lowell R. R.*, 4 Cush. (Mass.) 400, 50 Am. D. 794; *Schopman v. Boston and Worcester R. R.*, 9 Cush. (Mass.) 24, 55 Am. D. 41. The carriers of passengers are not, like the carriers of goods, insurers against everything but the act of God and public enemies. But they are bound to exercise reasonable care according to the nature of their contract; and as their contract involves the safety of the lives and limbs of their passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking.

The defendants object that they cannot be held to the exercise of the utmost care and diligence which human care and foresight are capable of. But such was not the language of the court. They were only held to the utmost care in providing suitable and proper carriages, engines, tracks, and agents, in order to prevent those injuries which human care and foresight can guard against. The object is to prevent such injuries as are the subject of human care and foresight; that is, such as are not inevitable. The duty is to use the utmost care in regard to the ordinary and usual appliances and means of carrying on their business. They are not to take every possible precaution to prevent injury; for that would be inconsistent with the cheapness and speed which are among the chief objects of railway traveling. But their care is to be exercised in relation to such matters and in such ways as are appropriate to the business they have undertaken, to afford proper and reasonable securities against danger; and it is only in regard to these, from the importance of the interests involved, that they are held to a proportionate, that is, to the utmost care, and diligence.

Exceptions overruled.

132. MAGOFFIN V. MISSOURI PACIFIC RAILWAY CO.,

102 Mo. 540; 15 S. W. R. 76; 22 Am. St. R. 798. 1890.

SHERWOOD, P. J. Action for five thousand dollars damages for the death of plaintiff's husband, caused by a collision of two of the trains of the defendant.

The cause was tried on this stipuation: "1. Elijah H. Magoffin, the husband of the plaintiff, was killed by a collision between two trains of cars of the defendant on the line of the defendant's railroad between Greenwood, Jackson County, Missouri, and Pleasant Hill, Cass County, Missouri, on the morning of November 27, 1886. 2. At the time of the death of said Magoffin he was in the employ of the United States of America as a postal-clerk, and was in one of the mail-cars attached to one of the trains of the defendant, and was *en route* from St. Louis, Missouri, to Kansas City, Missouri; and said passenger train and a certain other train belonging to the defendant, and running on its road, collided at the time and place aforesaid, and in the collision the said Elijah H. Magoffin was instantly killed. The said Elijah H. Magoffin paid no fare for his transportation, but was on the postal-car as an employee of the post-office department of the government of the United States, with which the defendant had a contract for the transportation of mails and postal-clerks."

To further sustain the issues on her part plaintiff testified substantially, as follows: That she was thirty-seven years old; had been married to deceased fifteen years; had four children, the oldest fourteen, and the youngest two years of age; that her husband, at the time of his death, was employed as a postal-clerk by the United States government, and had been so employed over a year, and received a salary of seventy-five dollars a month; that her husband left no fortune, and all they had to depend upon was his salary; that there was no provision left her by her husband; that they had a few hundred dollars, but they had to depend on his (her husband's) salary for a living; that her husband was killed November 27, 1886.

This was all the testimony offered. Whereupon the plaintiff, by leave of court, dismissed as to the second count of the petition. Whereupon, at the instance of the plaintiff, the court instructed the jury as follows: "1. The court instructs the jury that, under the undisputed evidence in the cause, the plaintiff is entitled to recover, and the verdict of the jury should be in her favor for five thousand dollars."

The court refused instructions in the nature of a demurrer to the evidence, and looking to a recovery of a less sum than five thousand dollars. The jury found for the plaintiff in that sum; hence this appeal. The answer was simply a general denial.

The stipulation already set forth is sufficient, in and of itself, to shift the burden of proof from the shoulders of the plaintiff to those of the defendant, since the facts admitted therein made out a case of *prima facie* negligence on the part of the defendant; and this being un rebutted and undisputed on the part of the latter, it was the duty of the court to direct the jury to find a verdict for the plaintiff; there was no other course left for the court to pursue. This position is supported both by reason and authority. And it is equally well settled that the deceased husband occupied as advantageous a position as a passenger, if he was not in fact one. He certainly was not an intruder; he was there by virtue of a contract made with the United States government for the transportation of the mails and postal-clerks; and he was one of those clerks. The fact that the government had contracted for his transportation along with the mails, to take charge thereof, did not make him any the less a passenger nor diminish the duty which the defendant owed him to carry him safely. Privity of contract is nonessential in such cases.

The case of *Pennsylvania R. R. Co v. Price*, 96 Pa. St. 256, is not at all analogous to the present one; for there a special statute controlled,—a statute which excluded postal-agents from the class designated as passengers. The same may be said of *Price v. Pennsylvania R. R. Co.*, 113 U. S. 218 5 S. Ct. R. 427, where the same statute was involved.

Nor can it be doubted that plaintiff was entitled to a recovery of five thousand dollars for the death of her husband, under the provisions of section 2 of the damage act: *Carroll v. Missouri Ry. Co.*, 88 Mo. 241, 57 Am. R. 382; *Sullivan v. Missouri Pacific Ry. Co.*, 97 Mo. 113, 10 S. W. R. 852.

The result is, that we affirm the judgment.

133. DOYLE V. FITCHBURG RAILROAD CO.,

162 Mass. 66; 37 N. E. R. 770; 44 Am. St. R. 335. 1894.

Tort for damages for death of Cornelius J. Doyle, who was employed by defendant railroad. He lived in Waltham with his father, riding back and forth daily on a monthly ticket which the carrier was accustomed to furnish to its employees living outside the city, and which contained on its back a condition

that the free ticket is accepted on the express agreement that the company should not be a common carrier as to him, or liable under any circumstances, whether negligence of agents or otherwise, for injury to the person or property of the passenger using the ticket. Duties of deceased to defendant were entirely confined to the day between 7 a. m. and 6 p. m. At 10 p. m., while returning from Boston on business of his own, he was killed in a collision due to the gross carelessness of the engineer. To a refusal of the court to rule that plaintiff could not recover defendant excepted.

MORTON, J. It is conceded that the death of the plaintiff's intestate was due to the gross negligence of an engineer in the employ of the defendant. The defense rests on two propositions: 1. That the plaintiff's intestate was not a passenger, but an employee; 2. If that is not so, that the defendant is not liable by reason of the conditions on the back of the ticket.

The statute is as follows: "If by reason of the negligence of a corporation operating a railroad, or of the unfitness or gross negligence or carelessness of its servants, while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, or in the employment of such corporation, is lost, the corporation shall be punished," etc: Pub Stats., c. 112, sec. 212. We do not think that at the time of the injury the plaintiff's intestate was "in the employment" of the defendant within the meaning of the statute. The defendant was not transporting him to or from the place of his daily labor, pursuant to the arrangement which existed between them. It had no control or authority over him. He was not traveling on any service for it. His time was his own, and the defendant was not paying him for it, and he could use it as he saw fit, and he was passing over the defendant's road entirely for his own business or pleasure. So long as he was working from day to day for the defendant, it might be said, in a popular sense, that he was in its employment. But we do not think that is the sense in which the words are used in the statute. Otherwise, if at any time, under any circumstances, passing over the railroad on a highway crossing on Sunday, for instance, on an errand to get a doctor for his father or a friend, he was injured by the gross negligence of the defendant's servants while engaged in its business, he would have no right of recovery. Nothing but the plainest language would warrant such a construction.

Was he a passenger? This question is a more difficult one, and there is force in the argument that to hold that he was a

passenger would subject the defendant to a higher degree of care toward him when traveling on its road on his own pleasure than when traveling pursuant to some purpose connected with his service as an employee. Nevertheless, we think that he must be regarded as having been a passenger. It is clear that a person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in traveling to and from his work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held toward the defendant the relation of a passenger at the time when he was injured. The cases to which the defendant has referred us are distinguishable from this. Those in this state were where the plaintiff was being transported in immediate connection with his employment: *Gillshannon v. Stony Brook R. R. Corp.*, 10 Cush. 228; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray, 466; *Gilman v. Eastern R. R. Corp.*, 10 Allen 233, 87 Am. Dec. 235; *O'Brien v. Boston & Albany R. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279. In the cases in other states the circumstances under which the injuries occurred were such that the plaintiff could at the time fairly be said to be in the employ of the defendant: *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Vick v. N. Y. Cent. etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Abend v. Terre Haute etc. Ry. Co.*, 17 Am. & Eng. R. R. Cas. 614; *International etc. Ry. Co. v. Ryan*, 82 Tex. 565, 18 S. W. R. 219; *Kansas City etc. R. R. Co. v. Phillips*, 98 Ala. 159, 13 So. R. 65; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. R. 123; *Evansville etc. R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. R. 345; *Manville v. Cleveland etc. R. R. Co.*, 11 Ohio St. 417; *O'Connell v. Baltimore etc. R. R. Co.*, 20 Md. 212; 83 Am. Dec. 549; *Hutchinson v. York etc. Ry. Co.*, 5 Ex. 343; *Tunney v. Midland Ry. Co.*, L. R. 1 Com. P. 291.

In considering the contract on the back of the ticket, the fact that the statute is a penal one must also be borne in mind. The word "damages" is not used in a strictly legal sense: *Sackett v. Ruder*, 152 Mass. 397, 403, 25 N. E. R. 736. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its ser-

vants, or agents. Originally the remedy was by indictment. Afterward it was extended to an action of tort: Stats. 1871, c. 381, sec. 49; Stats. 1874, c. 372, sec. 163; Stats. 1881, c. 199, secs. 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the amount is recovered by indictment or in an action of tort, it goes in either case to the widow and children and next of kin, and the executor or administrator has no interest in it. It is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it: Commonwealth v. Vermont etc. R. R. Co., 108 Mass. 7, 12; 11 Am. Rep. 311; Commonwealth v. Boston etc. R. R. Corp., 134 Mass. 211; Littlejohn v. Fitchburg R. R. Co., 148 Mass. 478, 482, 20 N. E. R. 103. Save as a matter of convenience, the proceedings properly enough might be instituted by the widow and children or next of kin, if the statute permitted it, as is done in certain instances under the employers' liability act: Stats. 1887, c. 270, sec. 2. We have not found it necessary to consider whether a release of damages for causing the death of a human being is or is not justified by public policy, though a statute has been enacted recently which seems to authorize such a release by express messengers: Stats. 1894, c. 469, sec. 2. Upon that, however, we express no opinion. The result is that we are of opinion that the exceptions must be overruled, and it is so ordered.

134. WILLIAMS V. OREGON SHORT LINE RAILROAD CO.,

18 Utah 210; 54 Pac. R. 991; 72 Am. St. R. 777. 1898.

Action for damages for personal injuries suffered by a passenger because of the negligent running of a train. Judgment for plaintiff.

MINER, J. (Omitting matters of pleading and practice).

3. The plaintiff gave testimony tending to show that in April, 1897, he applied to Mr. Boies, defendant's train master at Pocatello, Idaho, for employment. Boies agreed to give him employment as brakeman if he would go to Glenn's Ferry, Idaho. The plaintiff agreed to go to Glenn's Ferry, and Boies gave him a pass from Pocatello to that place and return. Plaintiff did not ask for the pass. The pass had an indorsement on the back of

it. Plaintiff could not say that he read it. It was usual, when a man was employed on a railroad and went to a particular place, to give him a pass to such place. Plaintiff's employment was to begin when he was put to work, and he was to begin work when he arrived at Glenn's Ferry and when placed at work. His time was not going on when the accident occurred. The understanding was that the plaintiff's time would begin when he was actually put to work. While traveling on a free pass in pursuance of the agreement, on defendant's railroad to the place of employment, and when near Malad bridge in Idaho, and before reaching Glenn's Ferry, the train was wrecked, and the plaintiff was injured.

The signature of the plaintiff on the back of the pass was admitted. The pass was received in evidence. But the following conditions indorsed on the back of the pass were offered in evidence, and on objection, were refused by the court:

"This ticket is not transferable, and it is void if presented by any other than the person named, or if any alteration, addition, or erasure is made upon it. The person accepting and using this ticket, in consideration of receiving the same, voluntarily assumes all risk of accidents and damages, and expressly agrees that the Oregon Short Line Railroad Company shall not be regarded as a common carrier, nor as liable to him for an injury to his person, or any loss or damage to his baggage which may occur while using this ticket, whether caused by the negligence of the company's agents or otherwise. Not good unless signed in ink by the person named on the pass.

"J. A. WILLIAMS."

Among other things, the court instructed the jury as follows: "I charge you that it was the duty of the defendant to use the utmost care and skill which prudent men are ordinarily accustomed to use in keeping its roadbeds, rails, and switch in proper repair, and adequate for the purpose for which they are used; and if you believe from the evidence that such care was not exercised upon the part of the defendant, by reason of which the train upon which the plaintiff was riding became derailed, which caused his injury, then I charge you that you should find a verdict in favor of the plaintiff."

The appellant contends that the court erred in refusing to admit in evidence the conditions on the back of the pass, and in giving the jury the above instruction, requiring the greatest care, as in case of a passenger, and claims that the plaintiff was an employee and not a passenger, and therefore the defendant only owed him the exercise of ordinary care at the

time of the injury, and that the instruction is incorrect, except when the relationship of passenger and carrier exists.

The testimony shows that the plaintiff had agreed to enter the employment of the defendant as a brakeman at such time as he could reach Glenn's Ferry, Idaho. Free transportation, with the conditions attached thereto, was given the plaintiff by the defendant, without request, for the purpose of enabling the plaintiff to reach the agreed place, where the employment would commence. Plaintiff's compensation was not to commence until he reached Glenn's Ferry, and was there given employment on the order given by the yard master. Therefore, the relation of employee and employer, master and servant, had not yet attached at the time of the injury which occurred at Malad bridge. The intention was to employ and be employed, and the pass was given with that expectation. The transportation of plaintiff to Glenn's Ferry was not a matter of charity or gratuity on the part of the defendant. The free pass was given by virtue of an agreement by which the mutual interests of the parties were considered. The plaintiff desired employment at Glenn's Ferry. The defendant desired plaintiffs' services at Glenn's Ferry, and agreed to transport him there free of charge, if he would go there and enter its employment after he arrived there. The plaintiff agreed to this arrangement. The transaction was a mutual benefit to both of the parties, and the pass did not alter it. This was a case where the defendant, as a common carrier of passengers, could not stipulate for the exemption from liability on account of the negligence of his servants. The pass was simply the evidence of a right to be transferred over the road, but not of a contract by which the plaintiff was to assume all the risks, and it would not have been valid if it had been. Under these circumstances it was not important what the back of the pass contained. Plaintiff's acceptance of the pass under the circumstances and conditions would not prevent a recovery. There was a valid consideration for the pass; the plaintiff was a passenger and entitled to that degree of care covered by the instruction. Being such, the defendant had no right to stipulate for the immunity expressed on the back of the pass: *Railway Co. v. Stevens*, 95 U. S. 655; *Railway Co. v. Lockwood*, 17 Wall. 357; 3 Wood on Railroads, 1696; 2 Wood on Railroads, 1203; *Doyle v. Fitchburg R. R.* 166 Mass. 492, 44 N. E. R. 611, 55 Am. St. R. 417; *Denver etc. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. R. 1106; *Flint etc. R. R. Co. v. Weir*, 37 Mich. 111, 26 Am. R. 499; *State v. Western etc. R. R. Co.* 63 Md. 433; *Gillenwater v. Madison etc. Ry. Co.*, 5 Ind. 339, 61 Am. D. 101.

It is argued that even if the ticket was a free pass gratuitously possessed with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is correct in this contention. It is held to be the general rule in most of the states that in the case of a person riding on a free pass the carrier is under the same obligations, as to care and vigilance, as he is to a passenger for hire; and as to a passenger to whom a pass is given, based upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence, by any notice to that effect printed upon the pass, as such conditions are held to be against public policy and void; 2 Wood on Railroads, 1208; 3 Wood on Railroads, 1696; *Rose v. Des Moines etc. Ry. Co.*, 39 Iowa, 246; *Railway Co. v. Wynn*, 88 Tenn. 330; *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46, 30 N. W. R. 282, 58 Am. R. 848; *Railway Co. v. Lockwood*, 17 Wall. 357; *Gulf etc. Ry. Co. v. McGown*, 65 Tex. 640; *Shearman and Redfield on Negligence*, sec. 492; *State v. Western etc. R. R. Co.*, 63 Md. 433; *Gillenwater v. Madison etc. Ry. Co.*, 5 Ind. 339, 61 Am. D. 101; *O'Donnell v. Allegheny Ry. Co.*, 50 Pa. St. 490; *Hutchinson on Carriers*, sec. 566.

In *Saunders v. Southern Pacific R. R. Co.*, 13 Utah 284, 44 Pac. R. 932, this court held, with reference to a drover's pass, where like conditions were attached, that the holder of a pass was a passenger, and entitled to protection as a passenger on such train, regardless of any clause in the contract exempting the carrier from liability from negligence of its servants, because such clause is against the policy of the law and therefore void. That when the passenger was received the company was liable for any injury which might befall him through the negligence of its servants, the same as though he actually paid his fare before entering the cars, and as to him the company was bound to the exercise of the same care: *Hutchinson on Carriers*, sec. 550b; *Railroad Co. v. Lockwood*, 17 Wall. 357.

Speaking of the duties of common carriers, in *Railroad Co. v. Lockwood*, 17 Wall. 357, the court said: (For this quotation see *ante* p. —.)

From a review of the great weight of authority in this country, the general rule, with reference to the liability of common carriers is held to be: 1. "That a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law"; 2. "That it is not just and reasonable in the eye of the law for the common carrier to stipulate for exemption from responsibility for the negligence of the master or his servants"; 3. "That these rules

apply both to carriers of goods and carriers of passengers, and with special force to the latter"; 4. "That where a person agrees with a carrier to enter in its employment at a certain place in the future, and in consideration of the mutual interests of both a free pass is given to the place of employment with conditions on the back rendering the carrier nonliable for injuries caused by its negligence, or that of its agents, and in traveling on the defendant's road to the place of employment the person is injured by the negligence of the carrier's agents, such person must be regarded as a passenger for hire and not an employee, and the carrier is liable for damages caused the passenger by its negligence." The conditions printed on the back of the pass were properly rejected. The instructions were not subject to the objection made.

We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

Zane, C. J., and Bartch, J., concur.

135. STEAMBOAT NEW WORLD V. KING,

16 Howard (U. S.) 469. 1853.

Mr. Justice CURTIS delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler flue was exploded through negligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose

any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. *Smith on Mer. Law.* 559; *Grant v. Norway*, 10 Com. B. 688, 2 Eng. L. and Eq. 337; *Pope v. Nickerson*, 3 Story, 475; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the *Philadelphia and Reading Railroad Company v. Derby*, 14 How. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of

careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gowen*, 18 Maine 177, the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story (*Bailments*, § 11), says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Brett*, 11 Meeson & Wels. 113; *Wylde v. Pickford*, 8 Ib. 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mason, 132, and *Foster v. The Essex Bank*, 17 Mass. 479, 9 Am. D. 168, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See *Toullier's Droit Civil*, 6th vol. p. 239, &c.; 11th vol. p. 203, &c. *Makeldey, Man. Du Droit Romain*, 191, &c.

But whether this term, gross negligence, be used or not, this

particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus Heath, J., in *Shields v. Blackburne*, 1 H. Bl. 161, says: "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of Mr. Justice Porter, in *Percy v. Millaudon*, 8 Martin (N. S.) 75. This qualification of the rule is also recognized in *Stanton v. Bell*, 2 Hawks (N. C.) 145, 11 Am. D. 744.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838 (5 Stat. at

Large, 306), provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer called the Wilson G. Hunt, was then about a quarter of a mile astern of the New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the Hunt says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the Hunt attempted to pass the New World. Fay, a passenger on board the New World swears, that on two occasions, before reaching "the slough" the Hunt attempted to pass the New World and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the Hunt attempted to pass the New World in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of Fay, as to the two previous attempts. Haskell, another passenger, says, "about ten minutes before the explosion I was standing looking at the engine, we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the New World, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the Hunt as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement,

that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board the New World, and by the pilot and assistant pilot of the Hunt, and is not denied by the master of the New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.

136. PHILADELPHIA & READING RAILROAD CO. V.
DERBY,

14 Howard (U. S.) 468. 1852.

Mr. Justice GRIER delivered the opinion of the court

This action was brought by Derby, the plaintiff below, to recover damages for an injury suffered on the railroad of the

plaintiffs in error. The peculiar facts of the case, involving the questions of law presented for our consideration, are these:

The plaintiff below was himself the president of another railroad company, and a stockholder in this. He was on the road of defendants by invitation of the president of the company, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was caused by coming into collision with a locomotive tender, in the charge of an agent or servant of the company, which was on the same track, and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep the track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision.

The instructions given by the court below, at the instance of plaintiff, as well as those requested by the defendant, and refused by the court, taken together, involve but two distinct points, which have been the subject of exception here, and are in substance as follows:

1. The court instructed the jury, that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendant's counsel as forming a defence to the action, to wit: that the plaintiff was a stockholder in the company, riding by invitation of the president—paying no fare, and not in the usual passenger cars, &c.

2. That the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was not a defence to the action.

1st. In support of the objections to the first instruction, it is alleged, "that no cause of action can arise to any person by reason of the occurrence of an unintentional injury, while he is receiving or partaking of any of those acts of kindness which spring from mere social relations; and that as there was no contract between the parties, express or implied, the law would raise no duty as between them, for the neglect of which an action can be sustained."

In support of these positions, the cases between innkeeper and guest have been cited, such as *I Rolle's Abr.* 3, where it is said, "If a host invite one to supper, and the night being far spent, he

invites him to stay all night, and the guest be robbed, yet the host shall not be chargeable, because the guest was not a traveler," and Cayle's case (4 Co. 52), to the same effect, showing that the peculiar liability of an innkeeper arises from the consideration paid for his entertainment of travelers, and does not exist in the case of gratuitous lodging of friends or guests. The case of *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49, 38 Am. D. 339, has also been cited, showing that the master is not liable for any injury received by one of his servants, in consequence of the carelessness of another, while both are engaged in the same service.

But we are of opinion, that these cases have no application to the present. The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler, by stage coach, or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of "*respondeat superior*," which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either, that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings.

In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover.

It is a fact peculiar to this case, that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the

collision. But we would not have it inferred, from what has been said, that the circumstances alleged in the first point would affect the case, if the negligence which caused the injury had been committed by the agents of the company who were in the immediate care of the engine and car in which the plaintiff rode, and he was compelled to rely on these counts of his declaration, founded on the duty of the defendant to carry him safely. This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." See *Coggs v. Bernard*, and cases cited in 1 Smith's Leading Cases, 95. It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross."

In this view of the case, also, we think there was no error in the first instruction.

2. The second instruction involves the question of the liability of the master where the servant is in the course of his employment, but, in the matter complained of, has acted contrary to the express command of his master.

The rule of "*respondeat superior*," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See *Story on Agency*, § 452; *Smith on Master and Servant*, 152.

There may be found, in some of the numerous cases reported on this subject, dicta which, when severed from the context might seem to countenance the doctrine that the master is not liable

if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant.

The case of *Sleath v. Wilson*, 9 Car. & Payne, 607, states the law in such cases distinctly and correctly.

In that case a servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offence, he was acting in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr. Justice Erskine remarks, in this case: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it."

Although, among the numerous cases on this subject, some may be found (such as the case of *Lamb v. Palk*, 9 C. & P. 629) in which the court have made some distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master; yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior*, would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior,

can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the "*causa causans*" of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defence, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety.

The judgment of the Circuit Court is therefore affirmed.

137. BRIEN V. BENNETT,

8 Car. & Payne 724; 34 E. C. L. 984. 1839.

Before LORD ABINGER, C. B. Case—The declaration stated that the defendant was the proprietor of an omnibus for carrying passengers from Hammersmith and divers other places to London, and being such owner, the plaintiff at the request of the defendant, "agreed to become and became a passenger by the said omnibus to be safely and securely conveyed" from Hammersmith to London for reasonable fare and reward to the defendant, "and the defendant then received the plaintiff as such passenger as aforesaid, and thereupon it became and was the duty of the defendant to use due and proper care that the plaintiff should be safely and securely carried and conveyed by the said omnibus," yet the defendant, not regarding his duty, did not use proper care, &c., but on the contrary neglected it, so that by the negligence of the defendant and his servant in that behalf, "the plaintiff, whilst such passenger as aforesaid," fell from the said omnibus upon the ground, and was greatly hurt, &c. Pleas, 1st, not guilty; 2nd, denying that the defendant was the proprietor of the omnibus; 3rd, "that the plaintiff did not become a passenger by the said omnibus, nor did the defendant receive him, the plaintiff, as such passenger in manner and form as in the said declaration is alleged," (concluding to the country).

It appeared that the defendant's omnibus was passing on its journey, when the plaintiff, who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him up, and that upon his doing so the

driver pulled up, and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver supposing that the plaintiff had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

PLATT, for the defendant. I submit that the plaintiff never was a passenger.

LORD ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff—Damages 5*l*.

138. STANDISH V. NARRAGANSETT STEAMSHIP CO.,

111 Mass. 512; 15 Am. R. 66. 1873.

Tort for assault and battery and false imprisonment. Standish bought a ticket for passage from Boston to Fall River by rail, thence by defendant's steamer to New York, and thence by rail to Philadelphia. He checked his baggage, and on entering his berth showed his ticket to an employee of the boat who said it was all right. Plaintiff had no recollection of what became of the ticket. Next morning as he was attempting to leave the boat at New York his ticket was demanded of him, and he, not producing it, was turned back. He explained what had happened the night before and showed his baggage checks, and his railroad ticket to Philadelphia, but was informed that he must produce the boat ticket, or pay \$4 fare, or be carried back to Fall River that night. Being forcibly prevented from leaving the boat, after about two hours he paid the \$4 and left the boat. Judgment for plaintiff for \$50. Plaintiff alleged exceptions to the rulings and the refusals to rule.

CHAPMAN, C. J. The jury having found a verdict for the plaintiff for \$50, he excepts to all the rulings of the judge who tried the cause, and to his refusals to rule.

1. He contends that it should not have been left to the jury to find whether the plaintiff knew he was to give up the boat ticket before leaving the boat, because there was no evidence whatever tending to prove such knowledge. But from the manner in which passengers purchase tickets, and the use necessary to be made of them, any person of ordinary intelligence would infer that they are to be given up on the boat to some officer, and as they had not been called for earlier, he would naturally suppose that they

would be called for at the time of leaving the boat. Whether the plaintiff knew it was a question for the jury, under the circumstances of the case.

2. He contends that the defendants had no right forcibly to detain the plaintiff at all for the purpose of investigating on the spot the circumstances of the case. As passenger carriers the defendants had a right to make reasonable rules and regulations. It would be obviously reasonable to require passengers to purchase tickets at the office before the boat started, instead of taking money on board, and to give up these tickets at the end of the voyage while passengers were leaving the boat. If a passenger should attempt to leave without producing a ticket, and should allege that he had lost it, they would need to investigate the matter, and to ascertain the reason for his conduct, and to make reasonable provision for their own security. The ruling requested that they had no right to detain him, even if he was fraudulently trying to get his passage without a ticket and without paying the fare, was properly refused. The ruling was proper that if the plaintiff lost his ticket it would be his own loss, and not one which the defendants were to bear; and it was sufficiently favorable to the plaintiff to rule "that they had no right to detain him till he did pay his fare or give up a ticket, or to compel him to pay his fare or give up a ticket; but, if he knew that he was to give up his ticket before leaving the boat, the defendant had a right, if he did not give it up or pay his fare, to detain him for a reasonable time to investigate on the spot the circumstances of his case; and if the jury found that the defendants detained him for the purpose of compelling him to pay his fare or to give up his ticket, or detained him for the purpose of investigating his case for an unreasonable time, or in an unreasonable way, he was entitled to recover." Under this ruling the jury found for the plaintiff. As he had sufficient money to pay his fare, as it was his duty to do, he himself was the unnecessary cause of his own detention for two hours, and the damages found by the jury seem to be ample. Upon the ruling and verdict, the other points insisted upon in the plaintiff's brief became immaterial.

Exceptions overruled.

139. O'BRIEN V. BOSTON AND WORCESTER RAILROAD CO.;

15 Gray (Mass.) 20; 77 Am. D. 347. 1860.

Tort for wrongful ejection of a passenger. Plaintiff bought a round trip ticket from Cordaville to Brighton. He went to

Brighton and thence beyond to Boston. The same day he boarded defendant's train to return from Boston to Cordaville, offering the conductor his return ticket from Brighton to Cordaville. On plaintiff's refusal to pay fare either to Brighton or Cordaville the conductor rang the bell and stopped the cars where there was no station. O'Brien offered to pay before and after the cars stopped, but the conductor refused it and ejected him. Plaintiff again climbed on the cars and offered his fare, but the conductor again ejected him. The jury found the first ejection justifiable, but the second not, and gave \$150 damages.

By Court, BIGELOW, J. The correctness of the instructions given to the jury in this case can be readily ascertained by considering the nature of the contract entered into between the plaintiff and the defendants, and the respective rights and duties of the parties under it. On entering the cars of the defendants at Boston, the plaintiff had a right to be carried thence to his place of destination in that train on paying the usual rate of fare. This fare he was bound to pay, according to the regulations of the company, or on a reasonable demand being made therefor; if he failed to do so, then his rights under the contract ceased; he had forfeited them by his own act; and having himself first broken the contract, he could not insist on its fulfillment by the defendants. This is the rule of common law. It is also expressly enacted in statutes of 1849, chapter 91, section 2, that no person who shall not upon demand first pay the established toll or fare shall be entitled to be transported over a railroad. The defendants therefore were not bound to transport him farther, but were justified in ejecting him from the cars by the use of all lawful and proper means: Angell on Carriers, secs. 525, 609; Redfield on Railways, 26, 261; Stephen v. Smith, 29 Vt. 160. Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay fare after his ejection. They were not bound to accept a performance after a breach. The right to demand the complete execution of the contract by the defendants was defeated by the refusal of the plaintiff to do that which was either a condition precedent or a concurrent consideration on his part, and the non-performance of which absolved the defendants of all obligation to fulfill the contract. After being rightfully expelled from the train, he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. The right to refuse to transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party, who had hitherto refused to perform the contract

by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfillment of the original contract by the defendants. Besides, the defendants are not bound to receive passengers at any part of their route, but only at the regular stations or appointed places on the line of the road established by them at reasonable distances for the proper accommodation of the public: Angell on Carriers, sec. 527 a; Murch v. Concord R. R. Corp., 29 N. H. 39, 61 Am. Dec. 631. The plaintiff had therefore no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; *a fortiori* the plaintiff could not. It follows that, on the facts stated in the exceptions, the plaintiff proved no just claim for damages against the defendants, and the instructions given to the jury, under which the verdict was rendered, were clearly erroneous.

The court also erred in rejecting the evidence of the regulations established by the defendants concerning passengers who refused to pay their fare. The right to establish all needful and proper regulations is vested in the defendants by law: R. S., c. 39, sec. 83; Commonwealth v. Power, 7 Met. 602, 41 Am. Dec. 465. And they should have been permitted to prove them as part of their justification.

Exceptions sustained.

140. ZAGELMEYER V. CINCINNATI, SAGINAW & MACKINAW RAILROAD CO.,

102 Mich. 214; 60 N. W. R. 436; 47 Am. St. R. 514. 1894.

MONTGOMERY, J. This action is brought to recover damages for being forcibly ejected from defendant's car, while riding as a passenger.

The defendant had adopted a regulation requiring conductors to make an additional collection of ten cents on all fares paid by passengers taking defendant's trains from regular ticket stations. A notice had been posted in defendant's cars, which read: "Passengers will save ten cents on each fare by purchasing tickets before entering the cars."

Plaintiff, without buying a ticket, boarded a car on defendant's train at North Saginaw, bound for Salzburg, as he testifies, or West Bay City, according to the testimony of the conductor. When the conductor asked him for his fare, plaintiff tendered him a fifty-cent piece, and said he would pay him the legal and

lawful rate, but would not pay an extra ten cents because he had not purchased a ticket. The conductor thereupon forcibly expelled him from the train. Plaintiff recovered judgment of five hundred dollars, and defendant brings error.

1. Defendant contends that the requirement of passengers that they pay an additional sum of ten cents for failure to purchase tickets where there are stations is a reasonable regulation within the power of the company to make. Numerous cases have been cited by defendant's counsel in which it has been held that such a regulation, requiring the payment of a small sum in addition to the usual fare in case of failure to purchase a ticket, is a reasonable regulation, which the company has the right to make: *Swan v. Manchester etc. R. R. Co.*, 132 Mass. 116, 42 Am. Rep. 432; *Du Laurans v. First Division etc. Ry. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422, 19 Atl. R. 72, 17 Am. St. R. 818. Indeed, there can be little doubt as to the power of the railroad company to make such a discrimination between its passengers when acting under the common law, nor do we see any valid objection to a railroad company's charging an increased sum for passage where fares are collected on the train, provided that the sum collected does not exceed the statutory rate. But it is held, and we think properly, that the company cannot impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law: *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Chase v. New York Cent. R. R. Co.*, 26 N. Y. 523.

2. But it is contended that inasmuch as the plaintiff might have paid his fare and avoided being expelled from the car, he is entitled to recover no substantial damages. We are cited to various Michigan cases as sustaining this doctrine. But all the cases cited are cases in which the plaintiff had no ticket which, as between himself and the conductor, entitled him to ride upon the car in question, and in which there was no tender of the legal fare made. We think the case of *Hufford v. Grand Rapids etc. R. R. Co.*, 53 Mich. 121, 64 Mich. 631, 31 N. W. R. 544, 8 Am. St. R. 859, fully recognizes the right of the plaintiff to recover substantial damages for being evicted from the car when he either produces a ticket or stands ready to pay the legal fare: See, also, 19 Am. & Eng. Ency. of Law, 910, and cases cited.

* * * * *

The judgment will be affirmed, with costs.

141. O'ROURKE V. CITIZENS STREET RAILWAY CO.,

103 Tenn. 124; 52 S. W. R. 872; 76 Am. St. R. 639. 1899.

CALDWELL, J. Hugh O'Rourke brought this action against the Citizens' Street Railway Company to recover damages for an alleged wrongful and unlawful expulsion from one of its cars. The jury returned a verdict against him, and upon that verdict a judgment of dismissal was entered by direction of the court.

Having appealed in error, O'Rourke seeks a reversal, remand, and new trial for several reasons assigned.

Shortly after 2 o'clock in the afternoon of March 7, 1897, the plaintiff, with his wife and three small children, embarked upon a Beale and Lane avenue care of the defendant in the city of Memphis, and, after paying proper fares, requested and received from the conductor in charge the requisite number of tickets of transfer to a north-bound Main street car of the same company. At the proper place for the contemplated transfer the plaintiff, his wife and children, disembarked from the first car mentioned, and promptly took passage upon the other one. The conductor of the latter car, after examining the transfer tickets tendered by the plaintiff, said to him: "You were a long time waiting for this car." Plaintiff replied: "We ain't waited two minutes. We just got off that Beale and Lane avenue car, going south." Continuing the dialogue, the conductor said: "Well, you will have to get off or pay your fare"; and the plaintiff remarked: "I won't do either; I won't get off or pay my fare. I have paid my fare once, and that is, I think, sufficient to ride on." The conductor then caused the car to be stopped, took the plaintiff by the arm, and ejected him and his family from the car.

(Omitting a question of evidence.)

The expulsion, whether violent or otherwise, resulted primarily from a mistake of the first conductor in punching the transfer tickets so as to indicate their issuance at 1:40 P. M., when, as a matter of fact, they were issued nearly an hour later. The second conductor, judging the tickets by the punch marks, assumed, over the statement of the plaintiff to the contrary, that he had violated the rule of the company requiring all transfer passengers to take the first connecting car, and upon that assumption treated the tickets as expired, and, under another rule of the company, expelled the plaintiff when he refused to pay additional fare.

In his charge to the jury the trial judge said: "A person may

lose his right to continue his journey as a passenger upon a car under the following circumstances: 1. When he acts in such a way as to endanger the peace and comfort of the other passengers, he has no right to continue his journey upon the car; 2. When he presents to the conductor, as an evidence of his right to ride, a ticket or transfer check which shows upon its face that he has no such right, then he cannot continue his journey upon such ticket; 3. When the conductor, who declined to accept the ticket or transfer, gave such explanation of the defect in the ticket or transfer as would have satisfied any ordinarily reasonable person that the conductor was justified in refusing to take it, then he cannot continue his ride."

Though entirely sound in law, the first of these three propositions is wholly inapplicable in the present case, there being no evidence tending, in the slightest degree, to show that the plaintiff was guilty of conduct calculated to "endanger the peace and comfort of other passengers." Legal abstractions in a charge are not always hurtful, and, unless it appears that they may have been so, the giving of them, while never to be approved, is not reversible error. In this instance it is not improbable that the jury was misled into the belief that the court thought there was evidence on this particular point, and expected its consideration in the making up of the verdict; hence the irrelevant instruction may have been in some degree prejudicial to the plaintiff, and its inclusion in the charge is therefore noted as one ground of reversal.

The second proposition is one about which the authorities are in irreconcilable conflict. Many of them, like the charge of the learned trial judge, treat the face of the ticket as the sole criterion of the holder's right of passage, justify his ejection in case of defective ticket and refusal to pay fare, and allow him, as his only remedy therefor, an action of damages for the negligent mistake of the agent, or for breach of contract and not for expulsion (notably *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. Rep. 197; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. R. 531; *Hufford v. Grand Rapids etc. Ry. Co.*, 53 Mich. 118, 18 N. W. R. 580; *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 11 S. E. R. 737, 26 Am. St. R. 913; *Yorton v. Milwaukee etc. Ry. Co.*, 54 Wis. 234, 11 N. W. R. 482, 41 Am. R. 23; *Western Md. R. R. Co. v. Stocksedale*, 83 Md. 245; *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. R. 481; 4 *Elliott on Railroads*, sec. 1594), while others, on the contrary, deny the ticket such conclusive force and dignity, and rule that the passenger has the right to rely upon the acts and statements of the ticket agent or conductor, and that, if he be expelled on account of a defective

ticket when he has acted in good faith and is without fault, the carrier is liable in damages for such expulsion: New York etc. R. R. Co. v. Winter, 143 U. S. 60, 12 S. Ct. R. 356; Laird v. Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. R. 51; Ellsworth v. Chicago etc. Ry. Co., 95 Ia. 98, 63 N. W. R. 584; Northern Pacific Ry. Co. v. Pauson, 70 Fed. Rep. 585; Hot Springs Ry. Co. v. Deloney, 65 Ark. 177, 45 S. W. R. 351, 67 Am. St. R. 913; Head v. Georgia Pacific Ry. Co., 79 Ga. 358, 7 S. E. R. 217, 11 Am. St. R. 434; Georgia R. R. Co. v. Olds, 77 Ga. 673; Burnham v. Grand Trunk Ry. Co., 63 Me. 298, 18 Am. R. 220; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. R. 439; Hufford v. Grand Rapids etc. Ry. Co., 64 Mich. 631, 31 N. W. R. 544, 8 Am. St. R. 859; same case decided otherwise on former appeal and reported in 53 Mich 118; Murdock v. Boston etc. R. R. Co., 137 Mass. 293, 50 Am. R. 307, and other cases.

We concur in the latter view, and hold that a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket furnished him may not in any true sense express the contract. It is the contract and not the ticket that gives the right to transportation. The ticket is but an evidence of the contract, made out and furnished by the carrier; and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance.

The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right and the passenger is authorized to believe and presume that it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made.

The ticket, whether for transfer, as in the present case, or for original passage, may well be called the carrier's written direction by one agent to another agent concerning the particular transportation in hand; and if the direction be contrary to the contract, and expulsion follow as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent.

In our opinion, the legal result, in such a case, cannot be influenced by the fact that the carrier has conducted the transaction through two agents instead of one, for the combined acts of the two agents constitute but one continuous act of the carrier. Each agent is the alter ego of the carrier. The issuance of the void ticket is the fault of the first agent, the expulsion is the fault of the second agent, and both faults are those of the principal, which stands before the court as if it had made the con-

tract, issued the ticket and expelled the passenger through one and the same agent.

Beyond question, carriers have the legal right to require passengers to procure and present tickets, but that does not imply that passengers who have done their part in the matter, may be rightfully expelled from the car because the tickets they offer chance to be defective, or void. Before the rule of expulsion for want of proper tickets can be made absolute and universal in its application, the carriers must discharge the reciprocal duty of absolute and universal accuracy in the issuance of the tickets. The latter would be impossible, the former harsh and unreasonable. To require a passenger, who has made a valid contract for transportation and paid the requisite fare, as did the plaintiff, to retire from the car and suspend his journey because of an original defect in the ticket furnished him by the company's agent is to visit the wrong of the offender upon the offended; it is to make the rightful passenger suffer for the fault of the carrier, and that, too, in the latter's interest. This court will not yield its assent to a result so unjust and oppressive.

The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car and that the first conductor must have wrongly indicated the hour of issuance on the face of the ticket. On that statement the plaintiff should have been allowed to pursue his journey to its end. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of the contract, for which he became entitled to recover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained.

It may be true, as suggested in some of the authorities (*Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. R. 531; *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. Rep. 197; 4 Elliott on Railroads, sec. 1594), that the carrier can dispatch its business more conveniently and expeditiously, and can avoid losses through fraud and imposition more readily, by treating the ticket as conclusive evidence of the passenger's right to be carried, than by taking and adopting his *ex parte* statement of the real contract, when claimed to be different from the ticket; yet such ends, desirable as they may be and are, afford no legal sanction for the expulsion of a passenger who is without fault and whose ticket fails alone through the mistake or negligence of the carrier's agent, nor does their desirability render the expulsion

of such person any less a tortious breach of the contract. Every expulsion of a rightful passenger is wrongful.

It is no answer to the legal right of the *bona fide* passenger to say that the carrier's general interest is better subserved by his expulsion than by his carriage, by the violation of his contract than by its observance. His right is not to be affected by the mistakes of ticket agents, or the attempted frauds of imposters; these are to be met, if met at all, otherwise than through a rule that excludes innocent as well as fraudulent passengers. It is not allowable to punish the innocent with the guilty, to prevent the escape of the guilty.

A ticket agent, on selling ticket to proposed passenger, referred him to conductor for privilege of stopover at intermediate station; conductor authorized stopover, but instead of issuing stopover check only punched passenger's regular ticket, telling him that would be sufficient; second conductor, following rule of company, refused to recognize the punched ticket, and expelled passenger when he refused to pay fare; a judgment in favor of the plaintiff for ten thousand dollars was affirmed upon the ground that the expulsion was unlawful, the court saying: "The reason of such rule is to be found in the principle that where a party does all that he is required to do under the terms of contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract": *New York etc. R. R. Co. v. Winter*, 143 U. S. 60, 12 S. Ct. R. 356.

A street car conductor issued transfer ticket, punched at two time marks, 7:30 A. M. and 9 A. M., the conductor of car to which transfer was made refused to accept ticket on ground that it was two hours old, and ejected passenger on his refusal to pay fare, although informed that the ticket was issued at 9 o'clock, just before passenger got on car. Held, that the company was liable in damages for an unlawful ejection, the company, and not the passenger, being responsible for the defective or doubtful character of the ticket: *Laird v. Pittsburgh Traction Co.*, 166 Pa. St. 4, 31 Atl. R. 51.

By mistake a ticket agent sold a ticket dated back three days; the passenger presented it on the day purchased, but was expelled by the conductor because the ticket was antedated and holder refused to pay train fare; company held liable for wrongful ejection, the court saying the validity of the ticket depended upon the actual time of sale, and not upon its date: *Ellsworth v. Chicago etc. Ry. Co.*, 95 Ia. 98, 63 N. W. R. 584.

The holder handed return coupon to proper agent to be

stamped, at same time calling for sleeping car ticket; the agent returned coupon folded with sleeping car ticket, and holder put them in his pocket without examination. When presented on train it was discovered that agent had not in fact stamped coupon, and for that reason conductor refused to accept it, and expelled holder upon his refusal to pay fare. Held, that the holder, having done his part, was a legal passenger, and that the railway company was liable in damages for his expulsion: *Northern Pac. Ry. Co. v. Pauson*, 70 Fed. Rep. 585.

An agent sold a canceled ticket and delivered it as a good one; the conductor refused it, and the passenger paid the fare a second time to prevent ejection. He sued for damages, and the case was twice before the supreme court of Michigan. On the first appeal the court said that "as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel" (*Hufford v. Grand Rapids etc. Ry. Co.*, 53 Mich. 118, 18 N. W. R. 580), and on the second appeal the court, among other language, used the following: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks": *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 631, 31 N. W. R. 544, 8 Am. St. R. 859.

In concluding this part of this opinion, it should be remarked that our own cases of *Louisville etc. R. R. Co. v. Fleming*, 14 Lea, 146; *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776, and *Railroad v. Turner*, 100 Tenn. 224, are not in fact, and are not claimed to be, in point on the principal issue in the present case. The most that was decided in the first and second of them, in reference to a railway ticket, was that persons desiring to travel upon railway trains must procure and present tickets, when required by a rule of the company; and the last one dealt with a different branch of the ticket question, that of notice.

The meaning of the third proposition in that part of the charge heretofore quoted is somewhat obscure; yet, its effect seems to be that a passenger "cannot continue his ride" on a transfer ticket when the conductor points out such defect in it as justifies the conductor, under the rules of the company, "in refusing to take it." The instruction thus interpreted is erroneous, in that it impliedly repeats the proposition that the ticket is the sole criterion of the holder's right to passage, and also in that it attaches unwarranted importance to the explanation of the conductor.

No explanation the conductor might make could affect the plaintiff's legal right as a passenger. That right depended upon the contract and not upon the face of the ticket, and it was incumbent on the conductor to heed the plaintiff's explanation and observe the contract, rather than upon the plaintiff to accept the conductor's explanation as fatal and abandon his contract. The disclosure of the fault of one agent by another agent could not absolve their principal from the obligation of the contract, and render the plaintiff a trespasser. Such a result cannot be justified in law, whatever the rule of the company may be.

On the face of the transfer check were printed the following words:

"Transfer.—Passenger in accepting this transfer agrees to read and be governed by the conditions on the back hereof, subject to the rules of the company.

"G. F. JONES, V. P. & G. M."

The court instructed the jury that this requirement and all of the conditions on the back were reasonable, and that plaintiff was bound to comply with them.

In this instruction the court erred in at least two respects. Among the conditions printed on the back of the transfer check was one in this language: "Part of the conditions upon which this transfer is given and accepted are that the passenger examines date, time, and direction, and sees that the same are correct, and complies with all its conditions."

This condition is unreasonable, because no passenger can be bound to verify the act of the conductor in issuing a transfer check; and also because no inexperienced passenger, however intelligent, could, in the time at his command on so brief a trip, "examine date, time, and direction" indicated by the punch marks, and, without an explanation, see "that the same are correct." There is no little complication about these three items on the face of a transfer check, and especially about the matter of indicating the "time" of issuance. The plaintiff made no examination on receiving his check from the first conductor, and could scarcely understand the meaning of the punch marks when explained by the conductor who expelled him. The complexity of the checks, and the unreasonableness of the rule requiring a passenger to verify its correctness when issued, could hardly be better illustrated than by a statement from this record that the learned trial judge himself, with one of the very checks here involved before him, was not able to understand its meaning without a minute explanation.

At the trial the court, for its own information on the subject,

propounded certain interrogatories to one of the officers of the defendant about the meaning of one of these checks. Those questions and the answers thereto are as follows:

“The Court.—I wanted to ask you how would anybody know what these figures over there on the right end stand for? What is there to indicate the hours and minutes outside of just the figures themselves?

“A.—Well, I don’t know how I could explain that, judge.

“The Court.—What are those figures all over the right-hand end of the ticket?

“A.—The black figures are the hours and the little figures indicate 10, 20, 30, 40 and 50 minutes.

“The Court.—I don’t catch it exactly.

“Witness.—Well, here the figure is 1 o’clock, and if the ‘4’ is punched it would be 1:40, and if the ‘2’ is punched it would be 1:20.

“The Court.—Oh, yes, I didn’t catch it; I didn’t understand the thing. It would be 1:20 if the 2 is punched, and if the 3 is punched 1:30; and if the 4 is punched 1:40, and if the 5 is punched 1:50?

“A.—Yes, sir; same transfer that is used all over the country.”

It cannot be fair or just or reasonable to require passengers, in the hurry of rapid street car travel, to decipher at their peril a check whose meaning so intelligent a judge cannot ascertain by careful and deliberate inspection.

Another condition on the back of the check was expressed thus: “In accepting this transfer, passenger agrees that in case of controversy with conductor about this ticket and its refusal, to pay the regular fare charged, and apply at the office of the company for refund of same within three days.”

This condition is unreasonable, in that it makes the conductor, for the time, the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare though his ticket may be refused without sufficient cause; and, further, in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company, which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully exacted. It puts all of the burden of the “controversy” upon the wronged passenger, and none upon the wrongdoing company, and thereby makes the just suffer for the unjust.

Reverse and remand.

142. FORSEE V. ALABAMA GREAT SOUTHERN RAILROAD CO.,

63 Miss. 66; 56 Am. R. 801. 1885.

Action for ejection from train. Defendant charged more when fare was paid on train, and failed to afford plaintiff opportunity to purchase a ticket. Judgment for plaintiff.

ARNOLD, J. (Omitting minor points.) It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may in the exercise of this right make discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes and inconvenience incident to collecting fare and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. *State v. Goold*, 53 Me. 279; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. D. 276; *Swan v. Manchester etc. R. Co.*, 132 Mass. 116, 42 Am. R. 432.

But such a regulation is invalid and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a

trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterward recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 Redf. Railw. 104; *Evans v. M. & C. R. Co.*, 56 Ala. 246, 28 Am. R. 771; *St. Louis etc. R. Co. v. Dalby*, 19 Ill. 358; *St. Louis etc. R. Co. v. South*, 43 Ill. 176, 92 Am. D. 103; *Smith v. Pittsburg etc. R. Co.*, 23 Ohio St. 10; *Porter v. N. Y. Cent. R. Co.*, 34 Barb. 353; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. D. 276; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. R. 103; *State v. Goold*, 53 Me. 279; *Swan v. Manchester etc. R. Co.*, 132 Mass. 116, 42 Am. R. 432; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49, 2 Am. R. 102.

In such case exemplary damages would not be recoverable, unless the expulsion or attempted expulsion was characterized by malice, recklessness, rudeness, or willful wrong on the part of the agents or servants of the corporation. *Chicago etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. R. 373; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49, 2 Am. R. 102; *Pullman etc. v. Reed*, 75 Ill. 125, 20 Am. R. 232; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *Townsend v. N. Y. Cent. R. Co.*, 56 N. Y. 295, 15 Am. R. 419; *Paine v. C. R. I. & P. R. Co.*, 45 Iowa, 569; *McKinley v. C. & N. W. R. Co.*, 44 Iowa, 314, 24 Am. R. 748.

The cause was tried in the court below on theories and principles of law different from those here expressed, and the judgment is reversed and a new trial awarded.

143. KENT V. BALTIMORE AND OHIO RAILROAD CO.,

45 Ohio St. 284; 12 N. E. R. 798; 4 Am. St. R. 539. 1887.

Kent bought a thousand-mile "commercial travelers' mileage ticket," paying for it the usual price. He did not sign the ticket at the time, nor even know the conditions printed on it. He used the ticket several times without signature, but at length one of the conductors refused to honor it unless he would sign the conditions. He refused, as he was unwilling to agree to one condition releasing the company from the fraud or negligence of its agents. As the company's instructions to its agents, and its uniform custom, required such signature, plaintiff was ejected from the train. Verdict for plaintiff in court of common pleas was reversed in the circuit for refusal of judge to instruct as requested, and the case came up on this question.

OWEN, C. J. The instructions requested and refused ignored the proof which tended to show that Kent received the ticket from the company's agent without actual knowledge of the conditions and directions written therein. They also presupposed that, by receiving the ticket, Kent acquiesced in all its terms and conditions, in spite of the fact (which the evidence tended to prove) that he may have been wholly ignorant of them.

It is well settled that the purchaser of a railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them: *Baltimore & O. R. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Davidson v. Graham*, 2 Ohio St. 135; *Jones v. Voorhees*, 10 Ohio, 145; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; 2 Wharton on Evidence, sec. 1243; *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Malone v. Boston etc. R. R. Co.*, 12 Gray, 388, 74 Am. Dec. 598; *Camden and Amboy R'y Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. D. 481; Wade on Notices, secs. 543, 552, 554, 555; Lawson on Carriers, secs. 106, 107; *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469.

There is nothing in the circumstance that the ticket in the case at bar was sold at a rate reduced from the regular fare to take it out of the rule. The rate was the usual and established one allowed to a numerous class of patrons comprising commercial travelers whose principals were shippers over the company's road.

The contract between Kent and the railroad company was made when he bought his ticket, received and paid for it: *Rawson v. Pennsylvania R. R. Co.*, *supra*. Neither party could, after that, change its terms or impose new conditions upon its enforcement without the consent of the other. According to the company's instructions to agents, and by the uniform custom regulating the sale of such tickets, they were required to be signed before their delivery to the purchasers. The company saw fit, in the case at bar, to dispense with this requirement. It received the plaintiff's money, delivered him the ticket, in his ignorance of any request that he sign it, honored it for several trips without first requiring him to sign its conditions. It thereby waived this requirement, and its conductor was not justified, while it still retained plaintiff's money, in ejecting him from its cars by reason of his failure to sign the ticket, which had already gone into full effect between the parties, and his failure to pay the usual fare in money for a passage which was already paid for.

The conclusion we have reached relieves us of a consideration of the question arising upon the claim of counsel that the sixth condition of this ticket was against public policy, and would have been void if signed.

The trial court was right in refusing the instructions requested.

The judgment of the circuit court is reversed, and that of the court of common pleas affirmed.

144. PENNSYLVANIA RAILROAD CO. V. PARRY,

55 N. J. L. 551; 27 Atl. R. 914; 39 Am. St. R. 654. 1893.

Action for wrongful ejection from a train. Parry was traveling on an excursion ticket, and to save time left his train, walked to the station at a junction point and caught another train that would reach his station earlier than the regular train. The conductor refused to receive the excursion ticket on that train, and on Parry's refusal to pay fare ejected him. Error for refusal of court below to nonsuit.

The CHANCELLOR. The motion to nonsuit presented to the court below this question, whether the contract between Mr. Parry and the railroad company permitted Mr. Parry to quit the branch road train before it reached its destination, and, proceeding in advance of it, continue his journey in a train with which it did not connect, and was made available to him only by accidental delay.

It is established by the course of judicial decision that when a person who purchases a railway ticket to a certain place takes his seat in a particular train that goes to his destination he cannot, without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it and take another train, and complete his journey under the same contract. The reason is that his contract is entire, and neither he nor the company can be required to perform it in fragments: *State v. Overton*, 24 N. J. L. 435, 61 Am. D. 671; *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449; *Cheney v. Boston etc. R. R. Co.*, 11 Met. (Mass.) 121, 45 Am. D. 190; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432, 10 Am. R. 711; *Oil Creek etc. Ry. Co. v. Clark*, 72 Pa. St. 231; *Van Kirk v. Pennsylvania R. R. Co.*, 76 Pa. St. 73, 18 Am. R. 404; *Hamilton v. New York Cent. R. R. Co.*, 51 N. Y. 100; *Wyman v. Northern Pac. R. R. Co.*, 34 Minn. 210; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 352,

6 Am. R. 345; *Stone v. Chicago etc. Ry. Co.*, 47 Iowa 82, 29 Am. R. 458; *Churchill v. Chicago etc. R. R. Co.*, 67 Ill. 390; *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457; *Hatten v. Railroad Co.*, 39 Ohio St. 375; *Wilsey v. Louisville etc. R. R. Co.*, 83 Ky. 511.

It is not necessary that the contract of carriage should be fully set out in the passenger's ticket. The ticket is a mere token that the fare has been paid, and that the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway company. Such regulations, at least so far as they are known to the passenger, enter into the contract of passage, and it is the duty of the passenger to conform to them.

The proofs of the plaintiff below very clearly exhibited that Mr. Parry was familiar with the regulations under which the defendant company was accustomed to transport passengers between Riverton and Mount Holly upon such tickets as the one he purchased. He admits that he knew that the local accommodation train was apt to be belated, and that the train upon the branch road did not connect with it, and hence that the latter train would not continue to the Broad Street station in Burlington until the former had passed, and that it was possible occasionally to catch it by quitting the branch road train while it was waiting upon the Y, and walking a half mile to the Broad Street depot. Indeed, it was his accurate knowledge of the regulations of the company, and the delay they occasioned, that prompted him to disregard them when he saw an opportunity to expedite his transit.

He states that he could have purchased an excursion ticket from Riverton to Burlington and back, and another from Burlington to Mount Holly and return, for the same price that he paid for the single excursion ticket from Riverton to Mount Holly and return, and in that way have secured the undoubted right to return by the local accommodation if he could have caught it. But he did not purchase the two excursion tickets and make his contract in that way. He chose rather to buy the single ticket, which expressly provided that he should be transported between the terminal points of his journey "via Burlington branch," and subjected him to the regulations that he should be carried to the Broad Street station, and there change to the cars of a connecting train.

Under authority of the rule referred to, even in absence of the express notice upon his ticket that he should not "stop off en route" after he had once started in a train, it may be questionable whether it would not have been an abandonment

of his contract if he had left the train, while it was duly performing its duty, at any other point than that which the regulations designated for that purpose. The notice upon the ticket simply served to call attention to that rule. But in deciding this case it is not necessary to determine that question. The additional fact that, with the express notice which the ticket gave before him, he quit the branch train with the deliberate intention of not again taking either it or its connecting train, appears, and in light of such fact his nonconformity to the regulations which entered into his contract, and consequent infraction of that contract and abandonment of his rights thereunder, become too conspicuous to admit of doubt.

There was nothing in the evidence to indicate that the regulations of the defendant company were not reasonable, and it is admitted that the train abandoned was pursuing its way as those regulations required.

Under these conditions the conductor was justified in demanding a new fare, and, upon the refusal of Mr. Parry to pay it, to remove him from the train in the manner that was adopted: *State v. Overton*, 24 N. J. L. 435, 61 Am. D. 671.

It is our conclusion that the plaintiff below should have been nonsuited, and hence that the judgment now reviewed must be reversed.

145. FREDERICK V. MARQUETTE, HOUGHTON AND
ONTONAGON RAILROAD CO.,

37 Mich. 342; 26 Am. R. 531. 1877.

Judgment for defendant below.

MARSTON, J. This is an action on the case brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plaintiff tended to show that on the evening of January 29th, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office one dollar from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining sixty-five cents for the ticket, the regular fare to Marquette; that the plaintiff did not attempt to read what was on his ticket, nor did he count the change received back until next morning or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took

up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay thirty-five cents more. Plaintiff insisted he had paid his fare and purchased his ticket to Marquette and refused to pay the additional fare, whereupon he was ejected from the train, etc. On the part of the defendant evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan and not for Marquette. Under the pleadings and charge of the court other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case.

An erroneous impression seems to prevail with many that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed farther, or upon that train, that the company is liable in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present.

What, then, is the duty of the conductor in a case like the present? and what are the passenger's rights? In considering these questions we cannot shut our eyes to the manner and method which railroad companies and common carriers generally have adopted in order to successfully carry out their business. The view to be taken of these questions must be a practical one, even although it may work, perhaps, injustice in some special and particular cases, resulting, however, in great part, if not wholly, from other causes. In *Day v. Owen*, 5 Mich. 521, 72 Am. D. 62, Mr. Justice MANNING, in speaking of the rules and regulations of common carriers, said, "All rules and regulations must be reasonable, and to be so, they should have for their object the accommodation of the passengers. Under this head we include every thing calculated to render the transportation most comfortable and least annoying to passengers generally; not to one, or two, or any given number carried at a particular time, but to a large majority of the passengers ordinarily carried. Such rules

and regulations should also be of a permanent nature, and not be made for a particular occasion or emergency."

It is within the common knowledge or experience of all travelers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried; that these tickets are presented to the conductor or person in charge of the train, and that he accepts unhesitatingly of such tickets as evidence of the contract entered into between the passenger and his principal. It is equally well known that the conductor has but seldom if ever any other means of ascertaining, within time to be of any avail, the terms of the contract, unless he relies upon the statement of the passenger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount of business done, the agent in charge of the office, and who sold the ticket, could give but very little if any information upon the subject. That this system of issuing tickets, in a very large majority of cases, works well, causing but very little, if any, annoyance to passengers generally, must be admitted. There of course will be cases, where a passenger who has lost his ticket, or where through mistake the wrong ticket has been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situated, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it was designed to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects; it enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold, or if the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed, the following, we think, will be found amply sufficient, and we do not consider it necessary to analyze or review them. *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 298, 15 Am. Rep. 419; *Hibbard v. N. Y. & E. R. R.*, 15 id. 470; *Bennett v. N. Y. C. & H. R. R.*, 5 Hun, 600; *Downs v. N. Y. & N. H. R. R.*, 36 Conn. 287, 4 Am. Rep. 77; *C., B. & Q. R. R. v. Griffin*, 68 Ill. 499; *Pullman P. Co. v. Reed*, 75 Ill. 125, 20 Am. R. 232; *Shelton v. Lake Shore, etc. Ry. Co.*, 29 Ohio St. 214.

I am of opinion that the judgment should be affirmed with costs.

146. HUFFORD V. GRAND RAPIDS AND INDIANA RAILROAD CO.,

64 Mich. 631; 31 N. W. R. 544; 8 Am. St. R. 859. 1887.

Assault and battery for threatening a wrongful ejection of plaintiff from the train. The ticket agent at Manton sold him a punched ticket originally good for a ride from Sturgis to Traverse City. Plaintiff noticed the peculiarity in the ticket and returned to the ticket office to ask if the ticket was good. The agent assured him that it was good from Manton to Traverse City. As a matter of fact the punch mark told the conductor that it had been punched for a ride to Walton Junction beyond Manton, and was good only from Walton Junction to Traverse City. The conductor so informed plaintiff, who told the former of his conversation with the agent when he bought the ticket, adding that he had paid for his ticket and should not pay his fare again. The conductor then laid his hands on plaintiff's shoulder, rang the bell and said that unless he paid his fare, which was twenty-five cents, he would be put off the train. The fare was then paid under protest. Verdict for defendant, and plaintiff brings error.

SHERWOOD, J. (After stating the facts.) There seems to be no question but that the plaintiff purchased his ticket of an agent of the company, who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agent had the right to sell to passengers. The plaintiff had a right to rely upon the statements of the agent that it was good, and entitled him to a ride between the two stations. It was a contract for a ride between the two stations that the defendant's agent had a right to make, and did make, with the plaintiff.

The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company nor any of its agents could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of the company for the control of the action of its agents and the management of its affairs.

When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks. All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed. On the undisputed facts in this case, I think the plaintiff was entitled to go to Walton junction upon the ticket he presented to the conductor; *Maroney v. Old Colony & N. R'y Co.*, 106 Mass. 153, 8 Am. Rep. 305; *Murdock v. Boston & A. R. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307. See this case in 53 Mich. 118. . . .

The judgment must be reversed and a new trial granted.

Compare with *Frederick v. Railroad*, 37 Mich. 342, 26 Am. R. 531.

147. AUERBACH V. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.,

89 N. Y. 281; 42 Am. R. 290. 1882.

Action for damages for wrongful ejection from defendant's train on which plaintiff was a passenger. Judgment for defendant.

EARL, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was nonsuited at the trial and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows: The plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached"; that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of Sep-

tember then instant, and that if he failed to comply with such agreement either of the companies might refuse to accept the ticket or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and stayed there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows:

"Issued by Ohio and Mississippi railway on account of New York Central and Hudson River railroad. one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September, he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched several times, until the plaintiff reached Hudson about three or four o'clock, A. M., September 27, when the conductor in charge of the train declined to recognize the ticket on the ground that the time had run out, and demanded three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground, that although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon

any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. Hutch. on Carriers, § 579; Brooke v. Grand Trunk Railway Co., 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road, that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff, having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience, but under regulations of the defendant for its convenience, that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly ex-

pressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

148. BOSTON & LOWELL RAILROAD CO. V. PROCTOR,

1 Allen (Mass.) 267; 79 Am. D. 729. 1861.

Action for fare for carrying defendant from Lowell to Boston. The ticket was purchased of the Vermont Central, consisted of four coupons and had been used as far as Lowell by March 17th. He staid there until March 21st. Judgment for defendant and plaintiffs appealed.

By Court, CHAPMAN, J. The plaintiffs, having carried the defendant from Lowell to Boston, March 21, 1860, are entitled to recover their usual fare, being seventy-five cents, unless he has paid or tendered the amount. He offered to the conductor a ticket dated March 16, 1860, and having the words, "Good only two days after date," stamped in red ink upon its face. He contends that the plaintiffs were bound to accept this ticket; and that, contrary to its terms, he could at his option, and against their will, extend the contract from two days to five days.

But the courts of law must enforce contracts as the parties make them, and can neither set aside any of their terms nor add new ones. In the absence of fraud, which is not suggested here, the court can see no reason why the defendant should make his ticket available beyond its terms. The plaintiffs are not bound to issue tickets; and if they do issue them, they alone must fix their terms. They were not bound to make an arrangement by which the defendant, being in Vermont, could purchase a ticket through to Boston. But it is for the accommodation of the public, as well as of railroad companies, that arrangements should exist among connecting lines of roads, and that there should be tickets, by means of which passengers can pass over the whole route. Such arrangements, however, would be impossible, if every passenger were at liberty to disregard them. Should abuses grow out of the system, legislation can correct them.

Judgment for the plaintiffs.

149. CHICAGO & NORTHWESTERN RAILWAY CO., APPELLANTS, V. WILLIAMS,

55 Ill. 185; 8 Am. R. 641. 1870.

Action for damages for wrongful exclusion of plaintiff from defendant's railway car. Judgment of \$200 for plaintiff, and defendants appealed.

SCOTT, J. There is but one question of any considerable importance presented by the record in this case.

It is simply whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts: That, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car, on appellant's train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterward, entered the same car at that station and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use

of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their line of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held in the case of the Ill. Cent. R. R. Co. v. Whittemore, 43 Ill. 423, 92 Am. D. 138, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith. But such rules and regulations must always be reasonable and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some

principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. *The State v. Overton*, 4 Zab. 435, 61 Am. D. 671.

In the case of the *Westchester and Philadelphia R. R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. D. 744, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well-known repugnances, and, therefore, a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay,

vexation and indignity to which the appellee was exposed, if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrongdoer by such a verdict. But we apprehend that, if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

150. ZACHERY V. MOBILE AND OHIO RAILROAD CO.,

74 Miss. 520; 21 So. R. 246; 60 Am. St. R. 529. 1896.

Action against a common carrier for refusal to receive plaintiff as a passenger because he was blind. Defendants demurred, and the court below sustained the demurrer.

STOCKDALE, J. (After stating the facts.) The demurrer, admitting the truth of the allegations of the complaint, one of which is to the effect that the appellant had been riding on appellee's road for several years, pursuing his occupation, and had given no cause of complaint, and none had ever been made until January 25, 1896, and that the sole reason for rejecting him as a passenger was his blindness, it follows that the naked question, detached from any attending circumstances, is whether a person, otherwise qualified, may be rejected as a passenger for the sole reason that he is blind, and this court is asked to announce that to be the law. There seems to be a scarcity of decisions on the precise point.

In Rorer on Railroads, volume 2, page 957, it is laid down as the law that, "as common carriers of persons, railroad com-

panies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time cards, all persons who apply to be carried, and are ready to pay, and do pay, the usual fare when required, except unsuitable persons, hereinafter mentioned." These exceptions are those who desire to injure the company, notoriously bad or justly suspicious persons, gross or immoral persons, drunken persons, and those who refuse to obey the rules.

It is laid down in Angell on Carriers, section 524, to be the common law that "it is the duty of public or common carriers of persons *to receive all persons who apply for a passage*" (these words italicized). In section 525 it is said: "It is, in fact, beyond all doubt that the first and most general obligation on the part of public carriers of passengers, whether by land or water, is to carry persons who apply for a passage."

These are the general rules, subject always to the exceptions enumerated; but we have not found any decision holding that, as a matter of law, a person can be rejected because he is blind. It is urged by counsel for appellee that a rule of a railroad company authorizing the refusal, by its agents, of an infirm passenger, unless provided with an assistant, is reasonable and demanded by the convenience of the traveling public. A proposition we do not controvert, but in this case there is nothing in the record to show that appellee had made or promulgated such a rule. On the contrary, it is alleged in the complaint and admitted by the demurrer that appellant was not infirm but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrines laid down in *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 10, 48 Am. Rep. 74, relied on by appellee, do not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one. Appellee's counsel contends that infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them. But appellee admits, by its demurrer, that appellant was not such a passenger, and had never required extra care.

We do not desire to intimate any opinion as to what regulations and rules railroad companies may make as to passengers, but we decline to hold that, as a proposition of law, stripped of all attending circumstances, public carriers of passengers can

reject a person otherwise qualified, upon the sole ground that he is blind.

The judgment of the court below is, therefore, reversed, the demurrer overruled and the cause remanded.

151. MEMPHIS & CHARLESTON RAILROAD CO. V.
BENSON,

85 Tenn. 627; 4 Am. St. R. 776. 1887.

LURTON, J. This was a suit for damages for an alleged unlawful ejection of the defendant in error from the train of the plaintiff in error. There was a judgment for five hundred dollars in favor of the defendant in error rendered by the circuit judge, who tried the case without a jury. The railway company have appealed, and a number of reasons are assigned for reversal.

The defendant in error went upon the passenger train at Memphis, Tennessee, and went into the car set apart for ladies, and gentlemen traveling with ladies. This car at the time was overcrowded, and he was unable to obtain a seat, and this condition of things he saw before the train left Memphis, yet he made no demand at Memphis, the terminal station, for a seat; but, preferring to take his chances to get a seat, he remained on the car standing until after the train had started upon its trip. After the train had gotten well out of Memphis, the usual demand was made upon him for his ticket. This he declined to surrender, taking the position that he would not surrender his ticket until he had been furnished with a seat. The conductor called his attention to the fact that there was not a vacant seat in the car in which he was, and offered to get him a seat in the next forward car, and further saying that it would be but a short time before seats would be vacated by passengers for local stations, and that he would then give him a seat in the ladies' car. This he declined, and demanded a seat in the ladies' car before surrendering his ticket.

The demand of the conductor for his ticket was renewed in a short time, with the statement that he must either get off the train or surrender his ticket. This demand was again refused, and he further declared that he would not leave the train. Upon the train stopping at the next regular station, he, still refusing to leave the train, was ejected.

He neither surrendered his ticket to the conductor nor showed that he had such a ticket, nor did he state the point to which

he was destined. He bases his refusal to go into the forward car upon the ground that it was a smoking-car, and that the foul air of such a car was likely to make him ill.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him with a seat without transportation than it is when he is offered transportation without a seat. It is equally well settled that the passenger need not surrender his ticket until he is furnished with a seat, for the ticket is the evidence of the contract which entitles him to one. But it cannot be that one may ride free because not furnished with a seat. If the passenger chooses to accept transportation without a seat, he must, on demand, pay his fare. If unwilling to ride without transportation is furnished him in a seat, he must get off at first opportunity, and by so doing may bring his action for breach of contract, and recover as damages such sum as will compensate him for such breach, including such damages as are the natural and immediate results of such breach. *Rorer on Railroads*, 968, 969; *Davis v. Kansas City etc. R. R. Co.*, 53 Mo. 317, 14 Am. R. 457; *St. Louis etc. R'y Co. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558.

It results that for the indignity and vexation consequent upon the ejection in this case there can be no recovery. This result is made the more certain by the facts of this case, it appearing that at the time this passenger entered the car at the terminal station he saw that this car assigned to ladies, and gentlemen with ladies, was overcrowded, and he knew that he must either ride standing or take a seat in the car called the smoking-car. He gave the railway company no opportunity to furnish additional seats while at this terminal station. We have at this term, in the case of *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. R. 5, held that a railway company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable. This rule has been sustained in the courts of many states: *West Chester R. R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744; *Chicago and Northwestern R'y Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

So we think a regulation setting apart a car for ladies, or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will sit or in which car he

will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train, he cannot complain, and this was the substance of our decision in the *Ida Wells* case. The doctrine is equally applicable here. This passenger, when he took passage at Memphis, did it with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car, or go into the car designed exclusively for gentlemen, and in which smoking was permitted. The requirement that he should go temporarily into the smoking-car under these circumstances was not unreasonable. He ought not to have started when he did unless willing to submit to what he realized was an inevitable necessity, without giving the carrier notice of his demand.

But upon another ground this judgment cannot be sustained, even for damages for breach of contract. The defendant in error in his deposition states that he had a ticket purchased at Austin, Texas, which entitled him to passage to Atlanta, Georgia, and that one of the coupons upon this ticket entitled him to passage over the road of plaintiff in error from Memphis to Chattanooga. The ticket he does not produce, nor does he account for his failure to produce it by proof of its loss, or that he had subsequently used it. Objection was taken to this evidence, and the objection overruled, upon promise of counsel, at a subsequent stage of the trial, to account for its non-production so as to let in secondary evidence of the fact of the contract therein contained. This was not done. It is elementary law that the contents of a written or printed contract cannot be proven without the failure to produce the paper itself is accounted for. This objection is fatal to the whole case of defendant in error; for there is no legal evidence that he had a ticket. This being so, he was rightfully ejected.

The conductor who ejected this passenger, while using no unnecessary force, did use unnecessarily abusive language, such as was calculated to unnecessarily insult and degrade the person ejected. In exercising a legal right of ejection railway companies must not do so in an abusive way. They are the servants of the public, and while their right to enforce reasonable regulations will be upheld, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as from unnecessary indignity. The unreasonable demands of the defendant in error afford some excuse for the temper shown by the conductor.

In view, however, of the absence of any proof of a legal character that the ejected passenger had any ticket, and his refusal

to pay fare, and that, therefore, the relation of passenger and carrier did not exist, we are constrained to reverse the judgment of the circuit judge, and enter judgment here for plaintiff in error, the carrier in such case not being held responsible for the ejection.

152. INGALLS V. BILLS,

9 Met. (Mass.) 1; 43 Am. D. 346. 1845.

Assumpsit on an implied promise of defendants as common carriers to carry plaintiff safely from Boston to Cambridge. He was riding on the top of the coach when an axle broke and the coach settled on one side, but did not upset. Plaintiff was frightened and leaped to the ground, receiving the injuries complained of. There was a flaw in the iron of the axle, entirely surrounded by sound iron, and no external examination would have revealed it. There was evidence that all possible care had been taken to use the best materials and workmanship and to keep the coach in good repair. The judge refused to charge that this was enough, but did charge as stated in the opinion, and further that if, because defendants failed to fulfill their obligations plaintiff as a prudent precaution leaped from the coach, his recovery would not be defeated by the fact that it might now appear that he might safely have remained in his seat.

By Court, HUBBARD, J. The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveler.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage-coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against, or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner can not detect, after the most critical examination, as from those which might, on such an examination, be discovered. The learned judge ruled, that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only ap-

parently but really roadworthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are intrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been, and still are, held responsible for the safe delivery of the goods, with but two exceptions, viz., the act of God, and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason, that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight, in the maintenance of their rights, which the owners of goods can not do, who have intrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage-coach is held responsible for the safe carriage of passengers, so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution, and diligence, in the selection of the coach, and in the preservation of it during its use, will not be a defense to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of *Israel v. Clark*, 4 Esp. 259; *Crofts v. Waterhouse*, 3 Bing. 319; *Bremner v. Williams*, 1 Car. & P. 414; and *Sharp v. Grey*, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they can not be viewed in the light of established authorities. But we think, upon an examination of them, and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued. It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for

the loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White v. Boulton*, Peak. Cas. 113, which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said, "when these [mail] coaches carried passengers, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion can not be doubted, in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston v. Heaven*, 2 Esp. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage-coach, for negligence in the driving of their coach, in consequence of which it was upset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach-owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons the action stands alone on the ground of negligence.

The next case was that of *Israel v. Clark*, 4 Esp. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axle-tree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the case, assented, and said: "If they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started,

viz., whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of ship-owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie v. Griggs*, 2 Camp. 79, in 1809. There the axle-tree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said: "As the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axle-tree was sound, so far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner v. Williams*, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J., said he considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in *Crofts v. Waterhouse*, 3 Bing. 321, in 1825, Best, C. J., said: "The coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the

least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J., in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge (Best) in the case of *Harris v. Costar*, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff safely. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp v. Grey*, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured. There the axle was an iron bar inclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J., said: "The chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequences, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." And Alderson, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well

as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy.”

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of *Bosanquet, J.*, viz., that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship-owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we can not agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of *Sharp v. Gray* is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says: “This was entirely a question of fact. It is clear that there was a defect in the axle-tree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not.” And Tindal, C. J., who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant’s engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also *Bretherton v. Wood*, 3 Brod. & B. 54, 6 Moore, 141; *Ansell v. Waterhouse*, 6 Mau. & Sel. 385, 2 Chit. 1.

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by rea-

son of negligence. In the case of Camden and Amboy Railroad Co. v. Burke, 13 Wend. 626, 28 Am. Dec. 488, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of Hollister v. Nowlen, 19 Id. 236, 32 Am. Dec. 455, they say, that "stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies." In a case which occurred in respect to the transportation of slaves, Boyce v. Anderson, 2 Pet. 155, Chief Justice Marshall, in giving the opinion of the court, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of Stokes v. Saltonstall, 13 Id. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his treatise on bailments, secs. 592-600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and—from the number of artisans employed in the construction of the materials of a single coach—whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency, and adaptation of his

own manufactures to the uses designed—which, in a community like ours, could not be practically enforced—the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said, that the same observations might be applied to ship-owners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods intrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger, happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its cor-

rectness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable: *Jones v. Boyce*, 1 Stark, 493.

New trial granted.

153. MEIER V. PENNSYLVANIA RAILROAD CO.,

64 Pa. St. 225; 3 Am. R. 581. 1870.

Action for injuries received in an accident caused by the breaking of an axle on the sleeping car on which plaintiff was a passenger. New axles had been provided the year before by a reliable firm; they were of good quality and had been inspected twenty-two miles east of the place of the accident. Verdict for defendants and plaintiff appealed.

AGNEW, J. It is agreed on all hands, says Judge REDFIELD, in his work on Railways,, edition of 1867, p. 174, that carriers of passengers are liable only for negligence either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as carriers of goods and baggage of passengers. The numerous cases cited from which this result is drawn justify this statement. *Alden v. N. Y. Central Railroad Co.*, 26 N. Y. 102, 82 Am. D. 401, holding that a carrier is bound absolutely to provide a safe vehicle, irrespective of any question of negligence, is not in accord with the American cases generally, or the modern English decisions. It is reviewed in *Readhead v. Midland Railroad Co.*, 2 Law Rep., Q. B. 412, and therein said not to be founded in good reason. See the cases collected in *Shearman & Redfield on Negl.* (1869) 299, § 267.

The language of Judge GIBSON, taken from *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 204, that a carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, has no relation to the question now before us. The case he was considering was that of a car made without guards at the windows to prevent the arms of passengers being thrust out, to their injury, which he considered a defect in the construction of the car, making the carrier liable for negligence. The car was not perfect in its parts as he thought. The car was imperfect in construction, and therefore not adapted to the end to be attained, to wit, security. It may not be amiss to say that this opinion of the chief justice as to window guards, was not sustained by the court in

banc, and has since been overruled in *Pittsburg & Connellsville Railroad Co. v. McClurg*, 56 Pa. St. 294. The doctrine we are now asked to sustain is, that though the car is perfect in all its parts, if imperfect from some latent and undiscoverable defect, which the utmost skill and care could neither perceive nor provide against, the railway company must still be held responsible for injury to passengers, on the ground of an absolute liability for every defect. The plaintiff in error in effect contends that the defendants were warrantors against every accident, but even in the case referred to, Judge GIBSON denied this rule. He said of the carrier, he is bound to guard him (the passenger) from every danger which extreme vigilance can prevent. This expresses the true measure of responsibility. He answered a point in these words: "That the company is responsible only for defects discoverable by a careful man after a careful examination and exercise of sound judgment." Thus: "This is true, but were there such an examination and exercise of judgment? The defective construction of the car must have been obvious to the dullest perception," etc. The same rule was laid down in *Laing v. Colder*, 8 Pa. St. 482, 49 Am. D. 533. Judge BELL says, it is long since settled that the common-law responsibilities of carriers of goods for hire do not as a whole extend to carriers of passengers. The latter are not insurers against all accidents. But though (he says) in legal contemplation they *do not warrant the absolute safety of* their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. The same doctrine will be found in substance in *R. R. Co. v. Aspell*, 23 Pa. St. 149, 62 Am. D. 323, and *Sullivan v. The Philadelphia & Reading Co.*, 30 Pa. St. 234, and in other cases. In all the Pennsylvania cases, it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects, which is impossible.

The utmost which human knowledge, human skill and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business, that of insurance. Nor can we carry the requirements beyond the use of known machinery and modes of using it. Railroads must keep pace with science and art and modern improvement, in their application to the carriage of passengers, but are not responsible for the un-

known as well as the new. The rule laid down by the learned judge, in the language quoted in the second assignment of error, is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it. Laing v. Colder, 8 Pa. St. 482, 49 Am. D. 533; Sullivan v. Philadelphia & Reading Railroad Co., 30 Pa. St. 234; Shearman & Redfield on Negl., § 280; Redfield on Railways, § 1760, and notes. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent.

We think none of the errors assigned are sustained, and the judgment is therefore affirmed.

154. COMMONWEALTH V. BOSTON & MAINE RAILROAD CO.,

129 Mass. 500; 37 Am. R. 382. 1880.

Conviction under a statute of causing the death of a passenger.

SOULE, J. It is contended on the part of the government, that where the person killed was a passenger, the statute does not require, in order to the maintenance of an indictment, that he should have been using due care. But whether this is so or not need not be decided, because, in the opinion of a majority of the court, when Hill was killed he was not a passenger within the meaning of the statute.

It is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation at that station. Warren v. Fitchburg Rail-

road, 8 Allen, 227, 85 Am. D. 700. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful enginemen, conductors and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of traveling further. And while it is true, that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so, he assumes all risk of injury. *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501, 77 Am. D. 422. It would not be contended by any one that an indictment under the statute could be maintained against a railroad corporation for causing the death of one who without looking to see if the track was clear, jumped from a train which was running at ordinary speed between stations, and was immediately afterward killed by the engine of a train going in the opposite direction on another track. The indictment would fail because the facts showed that the corporation owed no duty to the deceased. He would have ceased to be a passenger, by voluntarily leaving the train at a place and time when and where the corporation could not anticipate that he would leave it, and when and where the corporation was under no obligation to see that he had an opportunity to leave its roadway in safety after leaving the train. He would have become an intruder on the track of the corporation, acting without any regard to the dangerous character of the situation, and not entitled to protection against the consequences of his own negligence. The principle involved in the supposed case is involved in and governs the case at bar.

So long as the train was in motion, Hill could not leave it and still retain his right to protection till he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger, and to have the rights of a passenger, as completely, though the train was moving slowly, and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. The fact that the car in which Hill was had passed the platform of the station to which he was entitled to be carried did not give him the right to leave the train at the risk of the

company. If he sustained any injury by being carried beyond the station, his remedy would be by an action, counting on that injury.

Hill, having ceased to be a passenger, was on the track of the defendant's road under circumstances which preclude the idea that he was in the exercise of due care. The evidence on this point is all in one direction, and it is to the effect, that if he had looked, he could not have failed to see that the approaching train on the other track was so near that he could not cross the track before it would strike him.

It follows that the defendant was right in asking the ruling that there was no sufficient evidence to support either count of the indictment. There was no evidence to support the counts in which Hill is alleged to have been a passenger, because by his voluntary act he had ceased to be a passenger, or to be entitled to protection as a passenger. There was no evidence to support the counts in which he is alleged not to have been a passenger, because there was no evidence that he was in the exercise of due care.

Exceptions sustained.

155. CHRISTIE V. GRIGGS,

2 Campbell 79. 1809.

This was an action of assumpsit against the defendant as owner of the Blackwall Stage, on which the plaintiff, a pilot, was traveling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed—there rested his case.

Best, Serjeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskilful, or of the coach being insufficient.

Sir JAMES MANSFIELD, C. J. I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to shew, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could any where be found. What other evidence can the plaintiff give?

The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers *a mere accident*.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of every thing like negligence, the question for the jury would be—as to the sufficiency of the coach. If the axle-tree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

156. JAMMISON V. CHESAPEAKE AND OHIO RAILWAY CO.,

92 Va. 327; 23 S. E. R. 758; 53 Am. St. R. 813. 1895.

Action by an infant by her next friend for damages for injuries received from falling from a train. The train slowed to eight miles per hour as it approached her station, but did not stop. Plaintiff went out of the car seeking the conductor, and as she reached the platform she was thrown from the train by reason of a jerking motion due to an acceleration of speed as the train rounded a curve. Verdict for \$3,000, subject to defendant's demurrer to the evidence. Demurrer sustained. Upon an order dismissing the suit of plaintiff a writ of error was secured.

KEITH, P. (After stating the facts.) Without doubt, the defendant in error was guilty of negligence in failing to stop the train at Ewell's station. For whatever loss or inconvenience plaintiff may have sustained by reason of this neglect upon the part of the defendant in error, she had an ample remedy, and would have been entitled to full compensation in damages. The injury, however, for which she sues is not the loss or inconvenience consequent upon that act, but for the damage she suffered by falling from the train, and the injuries she then sustained. The failure of the defendant in error to stop its train at Ewell's station was not the proximate cause of the injury for which the suit was brought, but, on the contrary, her injury was directly attributable to causes wholly independent of that act of negligence. Had she retained her seat she would have been safe, and, leaving the train at the next station, could have maintained an action for whatever loss or injury had been inflicted upon her. Instead of so doing, upon the advice of a fellow-passenger, she, after encumbering herself with bundles under each arm, passed out upon the platform, knowing, as she must or ought to have known, that the speed of the train was being accelerated; that the platform was in a position of danger, and there, "by a jerk," incident to the increase of speed from the slow rate at which the train had been moving when it passed the station, she was thrown from the platform, and injured.

Not only did her negligent conduct so far contribute to the accident as to preclude a recovery on her part, even though the evidence disclosed negligence upon the part of the company, but I am at a loss to discover in the record of this case any evidence whatever of negligence upon the part of the company, save and except its failure to halt its train at Ewell's station; but that act, as we have seen, was the remote and not the proximate cause of the injury, and cannot be taken into consideration as constituting an element of decision in this case.

Railroad corporations owe a high degree of duty to their passengers. They must do all for their safety that human skill and foresight may suggest, and are responsible for any, even the slightest, neglect; but that the passenger may hold the company to this high degree of responsibility, it is incumbent upon him to occupy the position upon the train assigned to passengers, and if he voluntarily assumes a position of peril, and injury results from it, he cannot recover.

In this case the plaintiff in error voluntarily placed herself in a position of peril, without justification or excuse, when, encum-

bered with bundles which incapacitated her for self-protection, she walked out upon the platform of a moving train.

The principles relied upon in this opinion have been so fully and so frequently enforced by the decisions of this court that they may be considered as established law: See *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666; *Richmond etc. R. R. Co. v. Morris*, 31 Gratt. 200; *Richmond etc. R. R. Co. v. Anderson*, 31 Gratt. 812, 31 Am. Rep. 750; *Dun v. Seaboard etc. R. R. Co.*, 78 Va. 645, 49 Am. Rep. 388. . . .

Judgment affirmed.

157. DODGE V. BOSTON AND BANGOR STEAMSHIP CO.,

148 Mass. 207; 19 N. E. R. 373; 12 Am. St. R. 541. 1889.

Tort to recover damages for personal injuries received while landing from defendant's steamer. Plaintiff was a passenger from Boston to Camden, and at Rockland left the steamer by a small plank provided for the use of employees only. He wished to secure breakfast at a restaurant on the wharf. Meals were served to those who paid for them on the boat.

KNOWLTON, J. This case presents an important question as to the rights and duties of passengers and common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and

proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight-house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time; and this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments: *Peniston v. Chicago etc. R. R.*, 34 La. Ann. 777, 44 Am. R. 444; *Jeffersonville etc. R. R. v. Riley*, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop, he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey, he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over a railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along

his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped for two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also *Clussman v. Long Island R. R.*, 9 Hun, 618, affirmed in 73 N. Y. 606; *Hrebrik v. Carr*, 29 Fed. Rep. 298; *Dice v. Willamette Transportation and Locks Co.*, 8 Or. 60, 34 Am. R. 575. In the first of these cases, the defendant was held liable for a defect in a platform of its station to a passenger who had left the train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank, and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover.

No decision has been cited that conflicts with our views. In *State v. Grand Trunk R'y*, 58 Me. 176, 4 Am. R. 258, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court, in that case, was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such, and at what point he would resume his former relation.

Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff, as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request

referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily intrusted, in a great degree, to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage-coaches, steamboats, and sailing-vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger.

In *Readhead v. Midland R'y*, L. R. 2 Q. B. 412, it is said that a "carrier of passengers for hire was bound to use the utmost care, skill and diligence in everything that concerned the safety of passengers." In *R. R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. D. 323, carriers of passengers are said to be responsible for "any species of negligence, however slight, which they or their agents may be guilty of." In *Warren v. Fitchburg R. R.*, 8 Allen (Mass.) 227, 85 Am. D. 700, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train. In *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361, 93 Am. D. 99, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers.

Gaynor v. Old Colony etc. R'y, 100 Mass. 208, 97 Am. D. 96, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. Mr. Justice Colt said in the opinion: "The plaintiff was a passenger, and while that relation existed, the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection, so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings, platforms, and means of egress as in their previous transportation." See also language of Chief

Justice Shaw, in *McElroy v. Nashua etc. R. R.*, 4 Cush. (Mass.) 400, 50 Am. D. 794.

Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions, "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these, are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular, it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars: *Warren v. Fitchburg R. R.*, 8 Allen (Mass.) 227, 85 Am. D. 700; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 315, 87 Am. D. 717; *Taylor v. Grand Trunk R'y*, 48 N. H. 304, 316, 2 Am. R. 229; *Tuller v. Talbot*, 23 Ill. 298, 76 Am. D. 695.

It may be assumed that the plaintiff would have ceased for the time to be a passenger, if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused. For, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in *Moreland v. Boston etc. R. R.*, 141 Mass. 31, 6 N. E. R. 225, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed, that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use

by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway, which was in fact used by the plaintiff, for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and, upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.

This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law: *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146; *Pennsylvania R. R. v. Zebe*, 33 Pa. St. 318; *McDonald v. Chicago etc. R. R.*, 26 Iowa 124, 142, 96 Am. D. 114; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. R. 716. We are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if by the word "notified," in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request. No instructions were given upon this subject, and because of this error the entry must be, exceptions sustained.

158. PENNSYLVANIA RAILROAD CO. V. ASPELL,

23 Pa. St. 147; 62 Am. D. 323. 1854.

Action for injuries to a passenger. On judgment for plaintiff defendant sued out a writ of error.

By Court, BLACK, C. J. The plaintiff below was a passenger in the defendants' cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some de-

fect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of the switches which were there to be crossed. The plaintiff seeing himself about to be carried on, jumped from the platform of the car and was seriously hurt in the foot. He brought this action, and the jury, with the approbation of the court, gave him one thousand five hundred dollars in damages.

Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the suffering and the loss, whether he does it in or out of a railroad car. It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained.

A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty.

From these principles, it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back; because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad.

It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to

avoid another. In such a case the author of the original peril is answerable for all that follows. On this principle we decided last year, at Pittsburgh, that the owners of a steamboat, which was endangered by a pile of iron wrongfully left on the wharf, and to get clear of it was backed out into the stream, where she was struck by a coal-boat and sunk, had a good cause of action against the city corporation, whose duty it was to have removed the iron: *Pittsburg City v. Grier*, 22 Pa. St. 55, 60 Am. D. 65. If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the cars is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained inside with more safety. Such was the decision in *Stokes v. Saltonstall*, 13 Pet. 181, so much relied on by the defendant in error. A passenger in a stage-coach, seeing the driver drunk, the horses mismanaged, and the coach about to upset, jumped out, and was thereby much hurt. The court held the proprietors of the line responsible, because the misconduct of their servant had reduced the passenger to the alternative of a dangerous leap or remaining at great peril. But did the plaintiff in the present case suffer the injury he complains of by attempting to avoid another with which he was threatened? Certainly not. He was in no possible danger of anything worse than being carried on to a place where he did not choose to go. That might have been inconvenient; but to save himself from a mere inconvenience by an act which put his life in jeopardy was inexcusable rashness.

Thus far I have considered the case without reference to certain facts disclosed in the evidence, which tend to diminish the culpability of the defendants' agents, while they aggravate (if anything can aggravate) the folly of the plaintiff. When he was about to jump, the conductor and the brakeman entreated him not to do it, warned him of the danger, and assured him that the train should be stopped and backed to the station. If he had heeded them, he would have been safely let down at the place he desired to stop at in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood-pile close to the track, and from a car going probably at the full rate of ten miles an hour.

Though these facts were uncontradicted, and though the court expressed the opinion that no injury would have happened to the plaintiff but for his own imprudence, the jury were nevertheless instructed that the defendants were bound to compensate him in damages. The learned judge held that the cases of mutual neglect did not apply, because this action was on a contract. Now, a party who violates a contract is not liable any more than one who commits a tort for damages which do not necessarily or immediately result from his own act or omission. In neither case is he answerable for the evil consequences which may be superadded by the default, negligence, or indiscretion of the injured party.

There is no form of action known to the law (and the wit of man can not invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself.

When the train approached Morgan's Corners some one (probably the conductor) announced it. Much stress was laid on this fact. The court said, in substance, that to make such an announcement before the train actually stopped was a want of diligence, whereby the plaintiff was thrown into a position of danger; and though he was warned not to jump, yet having done so, he could make the company pay him for the hurt he received.

We think this totally wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we can not see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of Morgan's Corner as an order that he should leap without waiting for a halt. If he did make that absurd mistake, it was amply corrected by the earnest warnings which he afterwards received.

The remark of the court that life and limb should not be weighed against time is most true; and the plaintiff should have thought of it when he set his own life on the hazard of such a leap for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers. This is a great evil, which we would not willingly encourage by allowing a premium on it to be extorted from companies. However bad the behavior of those

companies may sometimes be, it would not be corrected by making them pay for faults not their own.

The court should have instructed the jury that the evidence, taken altogether (or even excluding that for the defense), left the plaintiff without the shade of a case.

Judgment reversed, and *venire facias de novo* awarded.

159. FILER V. NEW YORK CENTRAL RAILROAD CO.,

49 N. Y. 47; 10 Am. R. 327. 1872.

Action for damages for injuries permanently disabling defendant. The train slowed up at her station, but did not stop. A brakeman said to her, "You had better get off; they are not going to halt any more." She tried to get off, but her skirts caught and she was dragged some distance, receiving painful and permanent injuries. A judgment for plaintiff was affirmed by the Supreme Court, and appeal was then taken to the Court of Appeals.

ALLEN, J. It was submitted to the jury, if they found that the plaintiff was directed by the brakeman to leave the cars or get off when the cars were in motion, to determine whether under the circumstances there was any such negligence on her part as would preclude her from recovering; the judge having in substance instructed the jury that if a person seeks to recover for injuries resulting from the negligence of another, he must himself be free from any negligence contributing to the injury. The question was put to the jury whether the plaintiff acted as prudent persons generally would have acted under the circumstances, and the charge was that, if she did, that would not bar a recovery.

There is no complaint of the manner in which the question as to the alleged contributory negligence of the plaintiff was submitted to the jury, if there was any question for submission. The claim of the defendant is, that the complaint should have been dismissed, or a verdict ordered against the plaintiff, upon the ground that she was culpably careless and negligent, and by her carelessness and negligence contributed to the injury, and that, there being no dispute as to the facts, the question was one of law for the court and not of fact for the jury.

Ordinarily the question of negligence is one of mixed law and fact, and it is the duty of the court to submit the same to

the jury, with proper instructions as to the law. What is proper care is sometimes a question of law, when there is no controversy about the facts; but where there is evidence tending to prove negligence on the part of the defendant, and a question arises whether the plaintiff has by his own fault contributed to the injury, it is ordinarily a question for the jury. If the evidence is of that character that a verdict for the plaintiff would be clearly against evidence, the question is one of law and should be decided by the court.

The fact is undisputed that the plaintiff received the injury while attempting to get off the cars while they were in motion, making very slow progress, and the jury have found that she was directed by the brakeman on the cars to get off, and was told by him that they would not stop or move more slowly to enable her to do so. That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of the duty it owed her, not to stop the train entirely and give her ample time to pass off with her luggage, is not disputed. Notwithstanding this, if the plaintiff did not exercise ordinary care, and might with ordinary care and prudence have avoided the injury, she is precluded from recovering.

The degree of negligence of which the parties are respectively guilty, or whether the fault of the defendant was a breach of contract or the mere omission of some duty resting upon it as a carrier of passengers, is not material.

The plaintiff's negligence may have been slight and that of the defendant what is ordinarily termed gross; but if the plaintiff's fault directly and proximately contributed to the injury, she cannot recover.

Indeed, it is now said that there is no difference between negligence and gross negligence, the latter being nothing more than the former, with a vituperative epithet. *Grill v. Iron Screw Collier Co.*, L. R., 1 C. P. 600; *Wilson v. Brett*, 11 M. & W. 113.

That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard.

The plaintiff had purchased a ticket and taken passage for

Fort Plain, at which place this train was advertised to stop, and, on approaching the station, the name of the place was called as a notice to the passengers intending to leave the train at that place to be prepared to get off, which was equivalent to notice that proper time and facilities would be afforded them for their passage from the cars, and the speed of the cars was reduced very greatly, so that the baggage was removed and taken from the baggage car by the porter; one man, supposed to be a little lame, had gotten off safely.

The plaintiff was told that the cars would not make any other stop, and that she must get off there, and in attempting to do so she was injured.

She was put to her choice, without any fault of hers, whether to obey the advice and suggestion of the defendant's servant, and follow the example of the man who had preceded her, or to remain on the cars and be carried beyond the place of her destination, and away from her friends, and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence.

It is true, there was no absolute necessity for this act; but she was called upon to decide upon the instant, and under peculiar circumstances, and ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong. If, in leaving the cars, she did not exercise the care and caution which she might, and ought to have done, and was careless and negligent in her movements, or in the care of her dress, and by reason of such want of care caused or contributed to the injury, she ought not to recover; but no question was made at the trial upon this branch of the case, except upon the effect of her leaving the cars when in motion.

Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured by leaping from them, and the attempt to leave the cars, under such circumstances, even at the instance of the railway servants, would have been a wanton and reckless act, and no recovery could have been had against the defendant. In *Lucas v. New Bedford and Taunton R. R. Co.*, 6 Gray, 64, 66 Am. D. 406, the plaintiff had accompanied a friend to the cars and remained with her until the train had started, and then of her own volition attempted to leave and received an injury, and it was held that her own act was the cause of the injury, and that the defendant was in no respect in fault.

In *Hickey v. Boston and Lowell R. R. Co.*, 14 Allen, 429, the plaintiff's intestate took a position upon the platform of a car as it was coming into a station, where he was exposed to danger,

voluntarily and without reasonable cause of necessity or propriety, and it was properly held that the express or implied assent and permission of the conductor of the train did not change the relation of the parties and relieve the deceased from the consequences of his own want of care. *Railroad Co. v. Aspell*, 23 Penn. 147, 62 Am. D. 323, differed essentially in all its circumstances from the case at bar. The plaintiff there leaped in the dark from a train of cars while under a high rate of speed, against the remonstrances of the persons in charge of the train, and under an assurance that the train would be stopped to permit him to alight. It was properly held a wanton and reckless act, precluding a right to recover against the railroad company. In the same case the principle was recognized that if a passenger was ordinarily careful and attentive to his own safety, and was injured by the negligence of the company, he might recover. *The Penn. R. R. Co. v. Kilgore*, 32 Penn. 292, 72 Am. D. 787, is more analogous to the case in hand. A female passenger, accompanied by three young children, on arriving at an intermediate station proceeded to alight with them. Two of the children had left the car, and while the plaintiff was still upon the train the cars started, when she sprang upon the platform on which one of the children had fallen prostrate and was injured. She was allowed to recover. It was held that the question of concurrent negligence was to be determined by the particular circumstances of the case. There, as in this case, the defendant had involved the plaintiff in the attempt to get off the cars; and her efforts, made with proper care under all the circumstances, cannot be imputed to her for negligence.

It is not denied that the attempt to leave the cars while they are in motion is wrong. But as said by Judge WOODWARD, in the case last cited, "it is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed."

McIntyre v. N. Y. C. R. R. Co., 37 N. Y. 287, is, in principle, analogous to this, and a recovery was had for injuries received by a passenger in passing in the evening, and under circumstances increasing the hazard of the undertaking from one car to another while the train was in motion, the attempt having been made by direction of the defendant's servants, and to obtain a seat which could not be had in the car in which the passenger was. A passenger voluntarily and without necessity making such an attempt and receiving an injury, would be held to be at fault and without remedy; but the peculiar circumstances of the case took it out of the general rule. In *Foy v. London*,

Brighton and South Coast R. R. Co., 18 C. B., N. S., 225, a recovery was had for an injury received in alighting from the cars, caused by the insufficient means for alighting furnished by the company, although the hazard of the attempt was as patent to the plaintiff as to the servants of the company. The jury there found that the defendant was guilty of negligence in not having provided conveniences for getting down from the carriage, and negatived the claim that the passenger contributed to the accident.

The court in banc sustained the recovery and refused leave to appeal, saying: "We do not think this a fit case to appeal." In that case, the lady was desired by a porter in the employ of the company to alight; and that circumstance was held by the court to distinguish it from a subsequent case. *Siner v. G. W. R. Co., L. R., 3 Exch. 150*; affirmed in *Exchequer Chambers, 17 W. R. 417*.

The case was similar in all its circumstances to *Foy's Case*, except there was no direction or request by the company's servants to the lady to get down from the carriage. The court held, against the dissent of KELLY, C. B., in the court of exchequer, and Justice KEATING, in the exchequer chambers, that there was no evidence of negligence to go to the jury. Chief Baron KELLY was of the opinion that the stopping of the train, without any notice to the passengers to get out, was an invitation to them to do so; that the descent, although dangerous, was not so clearly dangerous that the plaintiff might not properly encounter the risk; and that the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. The reasoning of the chief baron applies with force to this case, and is in harmony with *McIntyre v. N. Y. C. R. R. Co., supra*. The danger here was not certain, and the defendant cannot complain that the plaintiff did, under the circumstances, encounter some degree of peril, the jury having found that it was not imprudent for her so to do, and was encountered at the instance of the brakeman on the cars.

If the injury was caused by the awkward and careless manner in which the plaintiff got down from the cars, a different question would be presented. The motion for a nonsuit was properly denied.

Upon the question of damages, the jury were instructed to give the plaintiff, if the questions of fact were found in her favor, such an amount of damages as they thought she was

entitled to for the pain and suffering consequent upon her injury, and for any disqualification for labor in the exercise of her natural powers. A distinct exception was taken to that part of the charge which included, as an item of damages proper to be allowed, the plaintiff's disqualification to labor. The attention of the court being distinctly called to the precise point presented, an opportunity was given to qualify the charge and limit its application, if any thing less was intended than the language would clearly import.

It was not qualified or explained, and must be held as an instruction, that the plaintiff was entitled to recover consequential damages resulting from her inability to labor. That was put forth as a distinct item of damages proper to be allowed, and was not referred to as evidence of the extent of the injury and consequent pain and suffering.

There was no claim that the plaintiff was, at the time of the injury, carrying on any business, trade or labor, upon or for her sole and separate account. Her services and earnings belonged to her husband; and for loss of such services, caused by the accident, he may have an action; and another record before us shows that he has recovered for them, as he lawfully might do. Reeves' Dom. Rel. (Parker's ed.) 138, and cases cited, marg. p. 63. The Laws of 1860, chap. 90, permit a married woman to carry on any trade or business, and perform any labor or services on her sole and separate account, and give to her her earnings from her trade, business, labor or service; and she is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury, and for direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss.

The amendatory act of 1862, chap. 172, does not enlarge the rights of the wife, or detract from the rights of the husband, or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another.

Consequential damages are in all cases limited to the amount actually sustained; and unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages; she has lost nothing pecuniarily by reason of her inability to labor. The recovery was large, and was probably affected by the instruction that the inability of the

plaintiff to labor constituted one of the items of damage to be taken into account by the jury.

For this error in the charge, the judgment should be reversed and a new trial granted.

All concur, CHURCH, C. J., not sitting.

160. SPRINGER V. FORD,

189 Ill. 430; 59 N. E. R. 953; 82 Am. St. R. 464. 1901.

HAND, J. This is an action brought by the plaintiff to recover damages for an injury to his person. The trial resulted in a verdict and judgment for the plaintiff, which judgment has been affirmed by the appellate court for the first district.

The plaintiff was in the employ of the Kinsella Glass Company, a tenant of the defendant, occupying the sixth floor of an eight-story building, of which the defendant is the owner, located on Canal street, in the city of Chicago. The building was equipped with a passenger and a freight elevator, both of which were operated and controlled by the defendant. The falling of the freight elevator while plaintiff, in the discharge of his duty, was a passenger thereon caused the injury complained of.

At the close of the plaintiff's testimony, and again at the close of all the testimony, the defendant moved the court to instruct the jury to find the defendant not guilty, which the court declined to do, and the action of the court in that behalf has been assigned as error.

The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers: *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873; *Mitchell v. Marker*, 62 Fed. 139; *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Lee v. Knapp*, 55 Mo. App. 390; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399; *Southern Bldg. Assn. v. Lawson*, 97 Tenn. 367, 37 S. W. 86. In *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 50 N. E. 179, 64 Am. St. Rep. 37, we say: "Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one

floor to another in buildings.” In *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166, it was said: “The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway.” In *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, the court say: “The relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him.”

The operators of such elevators, upon the grounds of public policy, are required to exercise the highest degree of care and diligence. The lives and safety of a large number of human beings are intrusted to their care, and the law requires them to use extraordinary diligence in and about the operation of such elevators to prevent injury to passengers being carried therein. In *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 64 Am. St. Rep. 37, 50 N. E. 179, it is said: “It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein.” And in *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 166, the court say: “Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in the case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. Where the danger is great the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence.” And in *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 702, 42 N. W. 874, it is said: “The same reason exists for requiring on the part of the owner [of an elevator] the utmost care and fore-

sight and for making him responsible for the slightest degree of negligence.”

When a passenger is injured by reason of the giving way of some portion of the machinery or appliances by which the elevator is operated, the presumption of negligence from such breaking, unexplained, arises. In *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, we say on page 48 (160 Ill., 43 N. E. 811): “The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier. Undoubtedly, the law requires the plaintiff to show that the defendant has been negligent. But where the plaintiff is a passenger, a *prima facie* case of negligence is made out by showing the happening of the accident. If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised.” And in *Hartford Deposit Co. v. Sollitt*, 172 Ill. 225, 64 Am. St. Rep. 37, 50 N. E. 179, it is said: “The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed.” In the case of *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869, in an action by the servant of a tenant of a building against the owner for injuries caused by the falling of an elevator, the declaration alleged that the defendant had granted to the plaintiff’s employer, as part of his leasehold interest in the premises, the use of the elevator for moving his goods; that at the time of the accident the plaintiff was upon the elevator, engaged in the employment of moving his master’s goods; that the machinery in the elevator was defective and unsafe, of which he had no knowledge, but which fact was known to the defendant, or should have been known if he had exercised a proper amount of diligence. The court held that the declaration alleged sufficient facts to show that it was the duty of the defendant to keep and maintain the elevator in a safe and suitable condition for the plaintiff’s use, as the employee of the tenant; and, further, that the elevator not being under the control of plaintiff, it was not his duty to examine it and ascertain whether it was suitable and safe, and hence he was not required to allege specifically the nature of the defect which caused the accident.

The contention on behalf of defendant, that the principles above announced have no application to a person owning and operating a freight elevator, is not tenable when a passenger is lawfully and rightfully upon such elevator. Such passenger,

by reason of the construction of that class of elevators, is subjected to great risks and many hazards. The liability, however, of the owner or manager thereof as a common carrier is measured by the same rules, and he is held to the same degree of diligence, as that of persons owning and operating passenger elevators. In the case of *Chicago etc. R. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, where a passenger upon a freight train was held entitled to recover for a personal injury received by reason of the negligent management of the train, it was said (144 Ill. 271): "From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each." And in *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, it was held a drover riding on a railway freight train in charge of cattle he was shipping might recover for an injury received by the negligent management of the train. On page 48 (160 Ill.) the court say: "A carrier will be held to the same strict accountability for the negligence of its servants resulting in injury to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence when the transportation is upon a train devoted to passenger service exclusively."

In the case of *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178, we held that the owner of a passenger elevator was subject to all the rules and liabilities of any other carrier of passengers, and there is no reason, in principle, why the analogy held to exist between passenger and freight trains, as common carriers, does not exist between passenger and freight elevators, in cases where the owners of freight elevators permit the carriage of passengers thereon for hire. The proprietors of an elevator run for the use of the tenants of an office building is a carrier of passengers for hire. The proprietor's compensation is the rental paid him by the tenant: 10 Am. & Eng. Ency. of Law, 2d ed., 946.

The question as to whether the plaintiff was lawfully on the elevator at the time of the injury, in the performance of a duty incident to his employment, was a question of fact for the jury: *Stewart v. Harvard College*, 12 Allen, 58. That the elevator fell, that the plaintiff was rightfully a passenger thereon, and that he was seriously injured by its fall, was clearly shown by the plaintiff's testimony. The trial court did not, therefore, err in declining to take the case from the jury.

The provision in the lease of the defendant to the Kinsella

Glass Company, to the effect that the defendant should "not be liable for any damages occasioned by a failure to keep said premises and elevator in repair," was not binding upon plaintiff. He was not a party thereto. A carrier of persons cannot limit his liability to a passenger except by express contract with the passenger.

The court did not err in permitting the plaintiff to prove that it was his custom, as well as the custom of the employees of other tenants in the buildings, to accompany freight being elevated or lowered by them on said elevator while such elevator was being operated by the agent of defendant. Such evidence was properly admitted as tending to show that plaintiff was rightfully upon said elevator at the time of the accident.

The jury were properly instructed. All the refused instructions were covered by instructions given, or are in conflict with the views herein expressed.

We find no error in this record. The judgment of the appellate court will therefore be affirmed.

Compare *Burgess v. Stowe*, — Mich. —; 96 N. W. R. 29. 1903.

161. SEARS V. EASTERN RAILROAD CO.,

14 Allen (Mass.) 433; 92 Am. D. 780. 1867.

Action containing one count in contract and one in tort. Judgment for defendants and plaintiff appeals.

By Court, CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties: *Cheney v. Boston and Fall River R. R.*, 11 Met. 121, 45 Am. Dec. 190; *Boston and Lowell R. R. v. Proctor*, 1 Allen, 267, 79 Am. Dec. 729; *Najac v. Boston and Lowell R. R.*, 7 Allen, 329, 83 Am. D. 686. The principal question in this case is, What are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it: *Denton v. Great Northern R'y*, 5 El. & B. 860. It is an offer which, when once publicly made, becomes binding if accepted before it is retracted: *Boston and Maine R. R. v. Bartlett*, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that adver-

tisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour and demands a passage is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9:30 p. m., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11:15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up: *Brown v. Eastern R. R.*, 11 Cush. 101; *Malone v. Boston and Worcester R. R.*, 12 Gray, 388, 74 Am. Dec. 598. The defendants published daily advertisements of their regular trains in the *Boston Daily Advertiser*, *Post*, and *Courier*, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish

notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage: *Ware v. Hayward Rubber Co.*, 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.

162. GOLDBERG V. AHNAPPEE & WESTERN RAILWAY CO.,

105 Wis. 1; 76 Am. St. R. 899. 1899.

Action for the value of trunks sent to the station in the evening for checking the following morning. The defendant's agent had no knowledge of their ownership, or the purpose for which they were left there. They burned in the freight house during the night. Judgment for defendants.

DODGE, J. 1. The liability of a carrier for ordinary baggage while in its possession for carriage as such is very different from the liability while the same articles are in storage with it. In the first case it is an insurer; in the latter, liable only as a bailee for ordinary care. The exact point at which the possession for carriage begins and ends is not easy to define, but it is not such as to exclude some reasonable time at station before and after actual transportation. After transportation the higher liability continues only for such time as is reasonably necessary to present duplicate checks and to remove the baggage: *Hoeger v. Chicago etc. R. R. Co.*, 63 Wis. 100, 53 Am. Rep. 271. No reason is apparent why the same rule should not apply to the delivery for transportation, so that the owner has the right to deliver at the station such time before starting of train as may be reasonably

necessary for obtaining ticket, checking the baggage, etc., and that he cannot impose this extreme liability by earlier delivery without the consent of the carrier: *Green v. Milwaukee etc. R. R. Co.*, 38 Iowa, 100; *Goodbar v. Wabash Ry. Co.*, 53 Mo. App. 434. This defendant had, by a rule known to plaintiff, prescribed thirty minutes before train time as such reasonable time. It certainly cannot be said, as matter of law, that such limit is unreasonable, nor that twelve hours is reasonable, or was rendered reasonably necessary by the circumstances. The submission of that question to the jury was not an error of which plaintiff can complain. As to whether defendant assented to such delivery, and accepted plaintiff's trunks for carriage as baggage, with knowledge of their contents, was a disputed question of fact, and a finding in the negative has abundant support in the evidence.

2. The overruling of the objection to the testimony of defendant's agent, Reitzel, that there was no advantage to the company in having the trunks delivered the night before, was without prejudice; for it appeared by plaintiff's own testimony that the agent was prohibited from checking baggage until half and hour before train time, and that the convenience of the company obviously could not be enhanced by delivery of baggage earlier than that time.

3. Parol proof of the substance of the rules, printed on a card and tacked up in the depot, prohibiting checking until within half an hour of train time, could not have prejudiced plaintiff, for he testified that he had knowledge of such a rule. Further, any objection to parol testimony as to the contents of such card was obviated by proof that it had been destroyed in the burning of the station.

We find no reversible error in the record.

By the Court. Judgment affirmed.

163. RAILROAD CO. V. FRALOFF,

100 U. S. 24. 1879.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action by Olga de Maluta Fraloff to recover the value of certain articles of wearing-apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the

company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts:

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after traveling in Europe, Asia, and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing-apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theaters, or attending dinners, balls, and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case in 1873, the jury, being unable to agree, was discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and, at the same time, submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion

was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge, to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instructions to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated the company excepted in due form. The jury returned a verdict against the company for the sum of \$10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a minor and merely technical nature, which do not involve the merits of the case, or the just rights of the parties.

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction would have been proper. 1 Wall. 369; 11 How. 372; 19 id. 269; 22 Wall. 121. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action.

The circuit court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative

enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents. It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and consequently, of the degree of caution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when traveling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage,—the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier, which defeats all right of recovery. The instructions asked by the company virtually assumed that the general law

governing, the rights, duties, and responsibilities of passenger carriers described a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveler," says Erle, C. J., in *Philpot v. Northwestern Railway Co.*, (19 C. B. N. S. 321), "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing-apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Angell, *Carriers*, sect. 115. In *Hannibal Railroad v. Swift*, 12 Wall. 272, this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a deci-

sion of the Queen's Bench in *Macrow v. Great Western Railway Co.*, Law Rep. 6 Q. B. 121, where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons, Contr., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquied of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing-apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort, or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted any thing essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the company at Albany for transportation to Niagara Falls, the court charged the jury,

in substance, that every traveler was entitled to provide for the exigencies of his journey in the way of baggage, was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons traveling, for their comfort, convenience, and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travelers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveler might lead that traveler to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort, or convenience, the company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion*.

Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions

correctly defining the legal rights of parties. *Parsons v. Bedford*, 3 Pet. 446; 21 How. 167; *Insurance Company v. Folsom*, 18 Wall. 249.

(Omitting a reference to a statute.) Judgment affirmed.

164. KINSLEY V. LAKE SHORE & MICHIGAN SOUTHERN RAILROAD CO.,

125 Mass. 54; 28 Am. R. 200. 1878.

Action for loss of a hand-bag and contents. Plaintiff, a passenger on defendant's railroad, had purchased a ticket to ride in the sleeping car "China" attached to the train. At Toledo he left the car for dinner, and being informed by an employee in the car that his baggage would be safe he left it in the car. On his return he found the China had been taken out of the train and his baggage had been removed to another car, except the hand-bag, which was missing. Defendant sought to escape liability by showing that the China was owned and controlled by, and was in the care of, the employees of the sleeping car company, and was not under the management of the railroad company. The judge ruled this no defense, and ordered judgment for plaintiff. To this defendants excepted.

GRAY, C. J. Although a railroad corporation is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within his own control, it is liable for the loss of such an article by the negligence of the corporation or its agents or servants, and without fault of the passenger. *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *Bergheim v. Great Eastern Railway*, 3. C. P. D. 221.

In the present case, we need not consider whether the evidence introduced at the trial would justify the inference that the defendant had assumed the custody and control of the plaintiff's bag as a common carrier; for it was clearly sufficient to warrant the judge, by whom the case was tried without a jury, in finding that the bag was lost, without any fault of the plaintiff, by negligence on the part of the defendant in removing or undertaking to remove the plaintiff's baggage to another car in his absence and without notice to him.

The plaintiff's contract of transportation was with the defendant alone. The fact that the car was not owned by the defendant, but was used on its road under a contract with other

parties, who furnished conductors and servants to take charge of such cars, there being no evidence that the plaintiff knew of that contract, or had any notice that the car was not owned by the defendant and under its exclusive control, could not affect the measure of the defendant's liability to the plaintiff.

Exceptions overruled.

165. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD
CO. V. BOYCE,

73 Ill. 510; 24 Am. R. 268. 1874.

Action for value of baggage. Boyce was traveling with a trunk and box checked by defendants as baggage. On account of ill health he stopped over in Iowa five days, but his baggage went on to Chicago. As it was not claimed, it was stored in the company's warehouse, where it burned in the great Chicago fire, without fault on the part of the railroad. Judgment for plaintiff.

SCOTT, J. (After stating the facts.) Under instructions from the court, the jury found a special verdict, in which they enumerate the several articles which they find were contained in the trunk, and then find their respective values. The list contains several articles, the value of which was included in the verdict, and which could not, with any degree of accuracy, be said to constitute any part of a gentleman's traveling baggage—such as "one sacque and muff," "two silver napkin-rings," and perhaps some other articles, the whole amounting, in the aggregate, to something over \$40. To this extent, the finding of the jury, in any view of the law that can be taken, is erroneous.

But this is not the principal question in the case. Another objection taken is as to the law given to the jury, and it goes to the foundation of the action. The baggage having arrived at its destination, and no one appearing to claim it, the company caused it to be placed in its warehouse, or baggage-room. The question arises as to the responsibility of the company after its arrival, and before it was called for by the owner.

The law is well settled that the responsibility as carrier ceases when the carrier becomes a mere warehouseman, and from thenceforward he is bound to exercise the same care, and no more, that ordinarily prudent men do in keeping their own goods of similar kind and value. While the relation of common

carrier exists, the company is held responsible for baggage or freight as an insurer, and the reason given in the books is to prevent fraud, and the better to subserve the public interests.

But when does the liability of passenger carrier cease, and such carrier become mere warehouseman as to the luggage of passengers?

The rule is as stated by text-writers, that the responsibility continues until the owner has had reasonable time and opportunity to come and take away his baggage. If it be not called for within such reasonable time, the company may store it in a secure warehouse, and from thence its liability as a carrier ceases, and that of warehouseman is assumed. This doctrine is so well supported by authority that it admits of no controversy. 2 Redf. on Railways, § 171, sub-§ 3; Roth v. Buffalo and State Line R. R. Co., 34 N. Y. 548, 90 Am. D. 736; Louisville, Cincinnati and Lexington Railroad Company v. Mahan, 8 Bush, 184; Ouimit v. Henshaw et al., 35 Vt. 605, 84 Am. D. 646.

The difficulty is not in the rule as stated, but in the determination of what is a reasonable time and opportunity for a passenger to claim and take away his luggage. The impossibility of stating any absolute rule on this subject has given rise to the apparent conflict in many of the adjudged cases. It has been said, and we think with great force, that what constitutes such reasonable time and opportunity is a mixed question of law and fact, depending very much upon the peculiar facts of each individual case; but when the facts are undisputed it is purely a question of law, and the court should decide it. Louisville, Cincinnati and Lexington Railroad Co. v. Mahan; Roth v. Buffalo and State Line Railroad, *supra*.

In the case we are considering, the court, at the instance of appellee, instructed the jury "that a reasonable time allowed the plaintiff to claim his baggage means such time as is reasonable considering the state of his health, and his ability to proceed to his destination, or to make demand, and the other circumstances in the case proven."

This charge does not state the law correctly, as applicable to the facts of this case. Commonly the passenger and his luggage are carried on the same train, and it is delivered to him on the platform on his arrival. But if, for any reason, not the fault of the company, the passenger does not choose to claim it, the carrier may rightfully store it in a secure warehouse. This is not for the benefit of the carrier, but for the convenience of the traveler. It was never intended that passenger carriers should become warehousemen of the traveler's personal luggage. The common custom is to deliver it immediately upon its arrival at

its destination, on the platform. It would be extending the liability of such carriers beyond anything required by public exigency, or the necessities of public interests, to hold them responsible as common carriers after the lapse of reasonable time, or after the traveler has had a reasonable opportunity to claim and take away his personal baggage, and unless the carrier itself is at fault, it seems to us the passenger ought not to be permitted to extend the strict and rigid liability incident to common carriers, for any purposes of his own convenience, nor by reason of any inevitable accident to himself. The carrier never contracted to carry him as a passenger with a view to such extended liability for his baggage.

It is sought to justify the giving of the instruction upon the facts testified to by appellee, that his journey was delayed on account of sickness. The company, it is contended, consented to the delay by giving him a "lay-over ticket." It was under no legal liability to give him such a ticket, and it was done for the humane purpose of accommodating the passenger. He was physically unable to prosecute his journey. This was certainly no fault of the company, and if the carrier was willing to oblige him in his extremity, its responsibility ought not, for that reason, to be enlarged. Had his sickness continued for any considerable period, it seems unreasonable that the company, during all the time it should be compelled, in consequence thereof, to keep his luggage in its warehouse, should be held to the strict and rigid liability of a common carrier. We think the objection to this evidence offered by appellee ought to have been sustained; its production could only mislead the jury; it did not tend to show it was through any neglect or default of the company that it was compelled to place appellee's luggage in its warehouse; and if it proves anything, it is that the company gave him the "lay-over ticket" on the implied condition the passenger would consent that the carrier might place his baggage, on its arrival, in its warehouse, using ordinary care for its preservation. This fact would relieve the company from all responsibility as a common carrier. Had the passenger been at Chicago, and for his personal convenience had his baggage placed in the company's warehouse, this fact would relieve the carrier from all responsibility except for gross carelessness as a gratuitous bailee. *Minor v. Chicago and Northwestern Ry. Co.*, 19 Wis. 40, 88 Am. D. 670.

The case of *Roth v. The Buffalo and State Line Railroad Co.*, *supra*, cited by counsel for appellee, as supporting his view of the law, is not in conflict with the views here expressed, so far as the decision itself is concerned. The judge who delivered the

opinion of the court stated some hypothetical cases which might arise in the future, to which the principles of that decision should not apply. It was simply a passing remark, not the deliberate opinion of the court, and for that reason we are not inclined to give it the weight of an authoritative decision.

We are satisfied the verdict in this case is contrary to the law and the evidence, and the judgment will accordingly be reversed.

CHAPTER XV.

OF OTHER CARRIERS.

166. FOSTER V. METTS,

55 Miss. 77; 30 Am. R. 504. 1877.

Action on a promissory note given by defendants, contractors for carrying United States mail, to recompense plaintiff for his money stolen from the mail by an employee of defendants. Defendants demurred below. Demurrer sustained.

CAMPBELL, J. The post-office department is a branch of the government, instituted for public convenience. The government of the United States has undertaken the business of conducting the transmission and distribution and delivery of all mail-matter. The government is the carrier of the mails. It carries them by the aid of agents it contracts with for this service. Contractors for carrying the mail are the agents of the government in the business undertaken by them. The sender of mail-matter has no contract with the carrier of the mail-bags, and does not commit his mail-matter to him, but to the government, which has undertaken to receive, carry, and deliver it. The contractor for carrying the mail is neither a common carrier nor a private carrier. He does not carry for individuals, nor receive any compensation from them. He has no knowledge of the mail-matter he carries, and no control over it, except to obey the instructions of the post-office department. Letters and packets are inclosed in government mail-bags, secured by locks provided by the government, and at all times subject to the supervision and control of the officers and agents of the government in the post-office department, who may open the mail-bags and inspect the mail-matter they contain at will. Contractors for carrying the mail are instruments of government whereby it performs the function of transmitting mail-matter from place to place in the execution of this part of its business.

Postmasters are necessary agents for the performance of the business of the post-office department, and those who carry the mail from place to place are equally necessary, and engaged in the business of the government.

A rider or driver employed by the contractor for carrying the mails is an assistant about the business of the government. Although employed and paid, and liable to be discharged at pleasure by the contractor, the rider or driver is not engaged in the *private service* of the contractor, but is employed in the public service. *U. S. v. Belew*, 2 Brocken (U. S.), 280.

A carrier of the mail is required by law to be of a certain age, to take a prescribed oath, is exempted from militia and jury service, and is liable to certain penalties for violations of duty, as well as subject to be discharged from service by any postmaster in a certain contingency. He is a *subordinate agent of the government*, whose employment is contemplated and provided for by the government in contracting to have the mail carried. *Id.*

Contractors for carrying the mail are responsible for their own misfeasances, but not for those of their assistants. The assistants must answer for themselves. The only security for the safe transmission of packages by mail is the safeguards thrown around it by the regulations of the government, which announce that all valuables sent by mail shall be at the risk of the owner. All that the government promises in case of loss of money or other valuables from the mail is to endeavor to recover it and to punish the offender.

The duty of contractors to carry the mail is to carry it from place to place, subject to the regulations of the post-office officials. Their obligation is to the government. They and their assistants are agents of the government, and subject to the rule of law applicable in such cases. *Story on Agency*, §§ 313, 319 *n*, 321; *Shearm. & Redf. on Neg.*, § 177.

It is well settled that postmasters are not liable for losses occasioned by the sub-agents, clerks and servants employed under them, unless they are guilty of negligence in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their conduct. *Story on Agency*, § 319 *a*; *Story on Bail.*, § 463; *Wilson v. Peverly*, 1 Am. Lead. Cas. 785; *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. R. 613; *Whart. on Neg.*, § 292; *Shearm. & Redf. on Neg.*, § 180.

As remarked before, carrying the mail is just as necessary, and as much part of the business of the government as the service rendered at the offices by postmasters; and those employed about carrying the mail are as much the agents of the government as are postmasters and their clerks and assistants. The true test of the character of a person is, not who appoints or pays or may dismiss him, but whether or not he is about a public

employment or a private service. 1 Am. Lead. Cas. 621; Story on Agency, § 319 *et seq.*

In *Conwell v. Voorhees*, 13 Ohio 523, 42 Am. D. 206, and *Hutchins v. Brackett*, 2 Foster (22 N. H.) 252, 53 Am. D. 248, it was decided that contractors for carrying the mail are not responsible to the owner of a letter containing money transmitted by mail and lost by the carelessness of the agent of the contractors carrying the mail. The rules applicable to agents of the public were applied. And although the doctrine of these cases is criticised in *Shearm. & Redf. on Neg.*, § 180, and has been disputed in *Sawyer v. Corse*, 17 Gratt. 230, we adopt it as the better view.

In this case the money was stolen by the mail-carrier. As to that, he certainly was not the agent of the contractors for whom he was riding, and if they were liable for his acts within the scope of his employment, they were not liable for his willful wrongs and crimes. *McCoy v. McKowen*, 26 Miss. 487, 59 Am. D. 264; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. R. 356; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. D. 168; *Wiggins v. Hathaway*, 6 Barb. 632; Story on Agency, § 309.

As the defendants in error were not liable for the money "extracted" from the mail by the carrier, they did not make themselves liable by giving their promissory note for it. It is without consideration. The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note. *Newell v. Fisher*, 11 Sm. & M. 431; *Sullivan v. Collins*, 18 Iowa, 228; *Palfrey v. Railroad Co.*, 4 Allen, 55; *Allen v. Prater*, 35 Ala. 169; *Edwards v. Baugh*, 11 M. & W. 641; *Longridge v. Dorville*, 5 B. & Ald. 117; 1 Pars. on Cont. 440; *Smith on Cont.* 157; 1 Add. on Cont. 28, § 14; 1 Hill on Cont. 266, § 20.

Judgment affirmed.

167. TELEGRAPH CO. V. GRISWOLD,

37 Ohio St. 301; 41 Am. R. 500. 1881.

Action for damages for negligence of a telegraph company in transmitting the following telegram:

WOODSTOCK, ONTARIO, December 23, 1871.

Messrs. Griswold & Dunham.

Will you give one fifty for twenty-five hundred at London? Answer at once, as I have only till night.

S. W. COWPLAND.

This was an inquiry whether the sender would pay \$1.50 in gold for 2,500 bushels of flaxseed at London, Ontario. As delivered the dispatch read "five" instead of "fifty." The dispatch was sent under the following agreement:

"MONTREAL TELEGRAPH COMPANY, FORM NO. 2.

"(Terms and conditions on which this and all other messages are received by this company.)

"In order to guard against, and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated, by being sent back from the station at which the message is received to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays, in the transmission or delivery, nor the non-delivery of the repeated messages, beyond two hundred times the sum paid for sending the messages, unless special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message, nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery of any unrepeated message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated therein, and paid for at the time. No liability is assumed for errors in cipher or obscure messages, nor is any liability assumed by this company for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company. No agent or employee

is allowed to vary these terms, or make any other verbal agreement, nor any promise at the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted.

“(Signed) JAMES DAKERS,
Secretary.”

“(Signed) HUGH ALLEN, *President.*”

Judgment for plaintiff.

BOYNTON, C. J. As we have reached the conclusion that the court below did not err denying the motion for new trial founded on the alleged insufficiency of the evidence to sustain the verdict, and as a review of the evidence would serve no useful purpose, it only remains to consider whether the court erred in the instructions given to the jury. The first question arises on the exception to that portion of the charge by which the jury were told that the special agreement under which the message was sent did not relieve the company from liability for the damages resulting from the inaccurate transmission of the message, if the mistake or error occurred through the negligence of the company or its agents. There seems to be a want of harmony in the decided cases on the point of the correctness of this instruction, and this no doubt arises, in some measure at least, from the different views taken of the nature of the employment in which telegraph companies are engaged, and to some extent from different views taken of their rights and liabilities by courts who fully agree upon the nature of such employment, but differ as to the extent of the duties and obligations that spring therefrom. In *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 78 Am. D. 589, the obligations of telegraph companies were held to be the same as those of common carriers, and consequently that they were in effect insurers of the safe transmission of a message, unless the transmission was interfered with by the act of God or the public enemies. An early case in England held the same doctrine. *McAndrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180. But the weight of authority both English and American is clearly the other way. *Ellis v. American Tel. Co.*, 13 Allen, 226; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544, 1 Am. R. 446; *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. R. 526; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. D. 338; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. R. 437; *Birney v. New York etc. Tel. Co.*, 18 Md. 341, 86 Am. D. 607; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. R. 485.

But that telegraph companies exercise a *quasi* public employment with duties and obligations analogous to those of a common carrier, is a proposition clearly settled. The statute confers upon them power of eminent domain, which no one will contend could be conferred upon them, consistently with the Constitution, if they were engaged in a mere private employment or occupation by which the public interests were not affected.

They are required to receive dispatches from individuals or corporations, including other telegraph companies, and to transmit and deliver the same faithfully and impartially in the order received, except in a few specified cases, where from public considerations certain preferences may be made. S. & S. 155. These provisions, as well as the nature of the employment itself, are entirely inconsistent with the theory that the business of conducting a line of telegraph is a mere private employment as distinguished from one carried on for the benefit of the public at large. Granting this, it is, however, contended that because the company is not an insurer of the safe transmission of a message, and is authorized to make or adopt such regulations and by-laws for the management of the business as it may deem proper (1 S. & S. 298, § 46), it cannot be made liable to the plaintiff below beyond the amount paid for sending the message, in the face of the stipulation against liability for any error in an unrepeatd message, notwithstanding such error resulted from the negligence of the company's agents by whom the message was sent over its wires. To this proposition we do not agree. It has long been the settled law of this State, that a common carrier cannot either by special agreement with, or by notice brought home to the shipper, relieve himself from liability for the consequences of his negligence. *Davidson v. Graham*, 2 Ohio St. 131; *Railroad Company v. Curran*, 19 id. 1.

In *Graham v. Davis*, 4 Ohio St. 377, 62 Am. D. 285, a case involving the liability of a common carrier who claimed exemption therefrom by reason of a special contract with the shipper—it was said that “one of the strongest motives for the faithful performance of a public duty is found in the pecuniary responsibility which the carrier incurs for its failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract therefore with one to relieve him from any part of this responsibility reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral because it diminishes the motive for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have.”

These considerations—there referred to common carriers—apply with equal force to those who furnish the means of telegraphic communication to the public. Their employment is not only public in its nature, but it has become a necessity alike to the social and commercial world.

Hence, it is as true of them, as of common carriers, that any stipulation or regulation that authorizes or enables them to secure exemption from liability for negligence, in the transmission or delivery of the message, reaches far beyond the person with whom they are dealing, and for whom the immediate service is being performed, and affects the entire public. The cases which hold that a common carrier may stipulate for immunity from liability for mere negligence, all agree that they are liable for “gross negligence.” But just what this term means is not easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong. *Jones on Bailm.* 8—46 *et seq.* But a majority of the cases would seem to hold it to be a failure to exercise ordinary care. In *Wilson v. Brett*, 11 M. & W. 113, it was said by Baron ROLFE, that he “could see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet.” In *Hinton v. Dibbin*, 2 Ad. & El. (N. S.) 646, Lord DENMAN remarked, that “when we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists.” See also *Beal v. South Devon Ry. Co.*, 3 H. & C. 337; *Austin v. Manchester Ry. Co.*, 11 Eng. L. & Eq. 513; and comments of PARKE, B., in *Wyld v. Pickford*, 8 M. & W. 443. In *Duff v. Budd*, 3 Brod. & Bing. 177, it was held by DALLAS, C. J., that “gross negligence is where the defendant or his servants have not taken the same care of the property as a prudent man would take of his own. And by BEST, J., in *Batson v. Donovan*, 4 B. & Ald. 21, that “they must take as much care of it as a prudent man does of his own property.”

In *Grill v. General Iron Screw Collier Company*, L. R., 1 C. P. 600, gross negligence was held to be a relative term and meant “the absence of the care that was requisite under the circumstances.” It was the absence of such care as it was the duty of the defendant to use in the circumstances of the case.

In *Beal v. South Devon Ry. Co.*, *supra*, it was held in the case

of a carrier that "gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected of him." CROMPTON, J., remarking, that "for all practical purposes, the rule may be stated to be that failure to exercise reasonable care, skill and diligence, is gross negligence." To the same effect is *Briggs v. Taylor*, 28 Vt. 181, and *Shearm. & Redf. on Neg.*, § 16; all substantially agreeing with WILLES, J., in *Lord v. Midland Railway Co., L. R.*, 2 C. P. 344, that "any negligence is gross in one who undertakes a duty and fails to perform it." See also, *Griffith v. Zipperwick*, 28 Ohio St. 388; and *Pennsylvania Co. v. Miller*, 35 id. 549, 35 Am. Rep. 620.

These authorities show a strong tendency in the adjudications to break down the impracticable distinction between what is termed gross negligence, and ordinary negligence, which some of the cases hold to exist. The rule, however, in this State is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care, which a careful and prudent man would under the circumstances employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service, is contrary to public policy, and consequently illegal and void. In our opinion telegraph companies fall within the operation of this rule; and that in failing to exercise such care and skill in the transmission and delivery of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business is expressly conferred by statute. But such rules must be reasonable, and if they fail to accord with the demands of a sound public policy they are void. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 id. 267.

We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it was received, is *prima facie* negligence, for which the company is liable; and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule not only rests upon sound reason, but is well sustained by well considered cases. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. R. 437; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673; *Tyler etc. v. W. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *W. U. Tel. Co. v. Carrew*, 15 Mich. 525; *De La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383; *W. U. Tel. Co. v. Meek*, 49

Ind. 53; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605.

If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability. We are further of the opinion that the court did not err in holding, and so instructing the jury, that the message received by the company for transmission was not obscure within the meaning of the stipulation in the agreement under which the message was sent. It appeared upon its face that it related to a business transaction, a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received. *Western Union Tel Co. v. Wenger*, 55 Penn. St. 262; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 265, 4 Am. Rep. 673; *Manville v. W. U. Tel. Co.*, 37 Iowa, 220, 18 Am. Rep. 8.

Judgment affirmed.

OKEY, J., dissented.

168. TRUE V. INTERNATIONAL TELEGRAPH CO.,

60 Me. 9; 11 Am. R. 156. 1872.

Action for damages for the non-delivery of a telegram. Facts stated by lower court for supreme court to determine whether True was entitled to more than cost of the message, and if so to determine the rule of damages and remand the case for assessment thereof.

KENT, J. On the 12th of January, 1870, the plaintiffs received a telegram from a firm in Baltimore, offering to sell them a cargo of corn at ninety cents per bushel. Whereupon one of the plaintiffs went to the office of the defendants and asked for one of the "night-message blanks," and wrote thereon the following telegram, addressed to the said firm, and paid forty-eight cents, the sum demanded: "To Radcliff & Patterson, Balti-

more;—Ship cargo named at ninety; if you can secure freight at ten, wire us result. Geo. W. True & Co.”

It is admitted that the telegram was never delivered to Radcliff & Patterson. It is also admitted that the message was sent the same night to Boston, which is the western terminus of defendant's line, and was thence forwarded by the Franklin Telegraph Company, with which the defendants have a business connection, making them responsible for the whole distance; the lines of the Franklin company extending through Baltimore to Washington. No reason is assigned for the non-delivery of the message.

1. The defendants admit their liability for the mistake or delay in the transmission, and for the non-delivery of the telegram. This is an important fact, and relieves the case of any difficulty in determining this primary and fundamental point of actual liability.

2. The defendants claim that this liability is limited to the repayment of the forty-eight cents. The plaintiffs claim damages for losses sustained by them, beyond this small sum, by reason of the non-delivery of the message.

3. This claim of exemption, on the part of the telegraph company, is based upon a special condition contained in the paper, on which the message, signed by the plaintiff, was written.

That paper, called a “night-message blank,” contained, above the written message, several printed specifications of the terms and conditions on which these night messages would be received and forwarded. The last one was in these words:

“And it is agreed between the senders of the following message and this company, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message, beyond the amount received by said company for sending the same.”

Then follows, next above the written message, the words, “Send the following message, subject to the above terms, which are agreed to.”

There can be no doubt that the above conditions, with the assent signified by the signature of the plaintiffs, covers this and all other cases of mistake and non-delivery. The question is whether the contract can legally be thus limited, and the defendants be thereby exonerated for all liability, to the extent claimed.

There has been much discussion in various cases, as to the nature of this comparatively new contract for the transmission of messages, by means of electricity; and the liabilities, limitations and qualifications of this undertaking. It has been likened

to the case of a common carrier, and it is contended by many, that all the strictness of the common law, applicable to carriers, is to be applied to telegraph companies. On the other hand, it is contended, that they are but simple bailees for hire, to do a certain specified thing—“*locatio operis faciendi*.” It is clear that telegraph corporations or companies exercise a public employment, or as said by C. J. BIGELOW, 13 Allen, 226 (*Ellis v. A. Telegraph Co.*), a *quasi* public employment; certainly as much so as express companies or stage-coaches or railroads. They often invoke the exercise of the right of eminent domain. They everywhere announce a readiness to transmit messages for all applicants, at fixed rates. The nature of their undertaking is analogous to that of carriers. One assumes to transmit a letter, the other a larger, sealed package, to a given destination. Both are bound by certain rules of law, and held to a faithful and exact performance of a specified duty. So far as public policy is concerned, there seems to be but little reason for not holding both to the same rules. It might be interesting to follow out these analogies, and to enter upon the discussions of various questions, touching the extent of the common law and statute liabilities of these companies, and the extent of the right and power of these companies to limit their liabilities by notice or conditions, apparently assented to by the other party.

But the case before us does not require this extended examination. It presents to us the single question, whether this condition is one which the company could rightfully impose upon its undertaking.

We are satisfied that telegraph companies, like all other corporations and individuals, may prescribe, adopt and enforce reasonable rules and regulations for the convenient and prompt and satisfactory performance of their duties and obligations, not inconsistent with that performance. We think they may go further and establish stipulations and regulations, to some extent restraining and limiting their common-law liabilities, made known to and directly or indirectly assented to by those employing them.

We are equally well satisfied that there is a limit to this power of avoidance of legal liabilities. It does not rest with such companies to fix these conditions absolutely, by which they may avoid duties and responsibilities, by their mere will, or by their views of self-interest, or desire to shield the company or its officers from the direct consequences of neglect or carelessness.

The public and those who employ these agencies to perform important services have rights, which cannot be ignored or avoided by stipulations made by interested parties. When a company

assumes the position of offering its services generally, to all who may apply, under its character of a public corporation, it does not stand exactly in the same position as private individuals contracting in a single matter, on terms and conditions mutually agreed upon for that particular case.

The discussions in the text-books and in the decided cases have led to the conclusion, that while, in the first instance, the company may make its rules for the regulation of its business, and for the limitation of its liability, those rules must be reasonable, in view of all the circumstances, and of the nature of the business, its risks and responsibilities, the necessity of securing to the public, who may have occasion to use this means of transportation, a reasonable protection against neglect or fraud or want of due care and effort, to perform punctually and correctly the act undertaken.

The company is not the ultimate judge of the reasonableness of an adopted rule. And in this single proposition lies the gist of the whole matter. The court must determine in every case when the question is directly raised, whether the particular restriction or qualification is a reasonable exercise of the powers residing in the company.

Several questions as to reasonableness have arisen under different conditions made by telegraph companies, and have been considered by the courts. One of them has arisen under a condition, which is found in the general blank of the defendant company, by which it is stipulated that the company will not be responsible for more than the sum received for mistakes or delays, or for non-delivery of any message, unless requested to repeat it on payment therefor, nor for more than fifty times the sum received for any repeated message, unless paid for insuring it.

It seems to be held, that however it may be in cases where the error causing the injury was occasioned by not repeating, or would have been manifestly prevented or avoided by repeating, yet this condition could not cover and excuse negligence or delay in delivering a message received, or any other nonfeasance or misfeasance not imputable to or excused by not repeating. *Western Union Telegraph Company v. Graham*, 1 Colorado, 230, 9 Am. Rep. 136; *Birney v. N. York & Washington Telegraph Company*, 18 Md. 341, 81 Am. D. 607.

In the case at bar no such question arises. No such condition is found in the "night message blanks" of the company. These messages are of a special class, and are made subject to their own rules, as printed on the blanks. The charge for transmission of these night messages is considerably less than on those in the

general business of the company, and, perhaps for this reason chiefly, the whole provision relating to repeating is omitted, and the sweeping and comprehensive provision by which in effect all liability beyond the price paid is avoided is substituted. It is clear that a mere change of rates or prices cannot avoid legal liability. The duty and responsibility of the company cannot properly be measured by the price for the duty undertaken.

The single question on this part of the case is whether the stipulation, recited in full at the commencement of this opinion, is a reasonable one, or one which the company could lawfully impose as a condition of the contract.

After a careful reading, it seems difficult to give any other construction to this clause than a general and unlimited exemption from all and any liability beyond the sum paid. It is not limited to those cases where reasonable care and attention might not prevent mistakes or delays. It makes no reference to the subtle and mysterious agency employed in the transmission of messages, or to the peculiar liability to error in the work of the operator. As before stated, this provision, in relation to night messages, does not require the repeating of telegrams sent, before a liability should attach. It simply and nakedly exonerates the company from all liability (except for the fee paid) for any and all mistakes in the transmission of the message—and for all delays in transmitting—and all delays in delivery, or even non-delivery, of the telegrams. These items seem to include all the cases of neglect, want of care or attention, of which the company can be guilty, in reference to the performance of their duties and obligations under the contract. Even gross negligence and the want of the lowest degree of care are protected from complaint, although affirmatively proved by the other party. The operator may, from sleepiness or haste to close for the night, prefer to pay back the trifle paid, and leave the message unsent. Or a message may have been carelessly, or even wantonly, thrown into the waste basket, and never sent, or if sent it may have been treated in the same manner at the office of reception, and never delivered to a carrier, or if so delivered, it may have been thrown aside or destroyed by the carrier to save himself labor or trouble. And the sender, under this rule, must be debarred from all remedy beyond a repayment of the few cents paid. This is not the establishment of a rule or rules for the management of the business which are reasonable and proper for the orderly conducting of its business, or to protect the company against unfair or unreasonable claims. In this case no attempt is made to excuse the non-delivery; but a liability is admitted.

We think this stipulation is not reasonable, for it does not

come within any established principle, applicable to employments of this nature, whether called public or private. It goes altogether too far in attempting to cover all possible delinquencies. "A party cannot in such a way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants and agents." *Ellis v. The American Tel. Co.*, 13 Allen, 234. In the case of *Birney v. New York & Wash. Tel. Co.*, 18 Md. 341, 81 Am. D. 607, the court says that courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power; one, indeed, that would leave the public almost remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select the agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to its agents their messages, however valuable they may be. Such being the case, public policy, as well as commercial necessity, require that companies engaged in telegraphing should be held to a high degree of responsibility.

We restate our propositions and conclusions on this part of the case in order to prevent any misapprehension of the extent and limitations of the rules laid down.

1. This company, and all others of a like nature, offering and undertaking to perform acts or services for all applicants, at fixed rates, exercise, at least, a *quasi* public employment.

2. Such company may adopt and enforce reasonable rules and regulations for the convenient and prompt and satisfactory performance of the act or duty undertaken.

3. This right in the company is not absolute and unlimited; but such rules are subject to the test of reasonableness in view of the rightful claims of public policy and private rights, and the enforcement of the obligation of good faith and honest effort to perform.

4. The test must be applied by the court, whenever the question arises on the validity of any such regulation, according to the rule before stated.

5. A rule, or stipulation, like the one in question which covers all possible delinquencies, mistakes, delays, or neglects in transmitting or in delivering or not delivering a message, from whatever cause arising, is not, for the reasons before stated, a reasonable regulation within the legal rule.

6. Such a rule is not saved from these objections, by the con-

dition of a liability to repay, if required by the sender, of the trifle paid to them. It is a mere evasion of the legal liability and is never the measure of damages for non-performance of a contract of this kind.

It is an insufficient and, therefore, an unreasonable stipulation, and cannot save the otherwise clearly objectionable condition of which it is a part.

Another question is presented relating to the rule of damages. It is agreed, according to the report of the case, that if the plaintiffs are entitled to recover a greater sum (than forty-eight cents) as special damages upon the facts aforesaid, this court is to determine the rule upon which damages shall be assessed.

The measure of damages in cases of this kind has been much discussed in the text-books and decisions in this country and in England. It would seem to be impracticable to attempt to lay down any single and simple rule, which can be made to apply, without qualification, to every case. There are, however, certain general principles which may be considered as applicable, generally to these cases, and to be now quite well established.

Before considering these principles, with these qualifications and limitations, it may be well to examine the character and exact extent of the message in the case before us. We may then be better able to apply the rules established or admitted, to this particular case. For it is the rule for this case, that we are called upon to define.

We assume that the plaintiffs can prove that the firm in Baltimore, to whom the telegram was addressed, had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiffs; that the telegram contained notice of acceptance of the proposition; that the condition named, "if you can secure freight at ten" (cents), could have been complied with, if the message had been delivered when it should have been; that, if it had been thus delivered, the bargain would have been closed, and the plaintiffs would at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents.

The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act, by which the bargain would become operative and complete. It seems clear that such a message has a distinctive and clear pecuniary value, and demands of the party who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence; and that he is subject, at least, to like rules and liabilities, as if he (not being a common carrier), had undertaken to transport an article of merchandise.

On its face it gives clear intimation that it is of a business character, relating to a distinct and specific contract, and that, according to the well-known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured.

In this respect it differs from a class of cases to be found in the reports, where the message was so brief or enigmatical, or so obscure, that it gave the operator no notice that it was of any value pecuniarily.

It differs also from another class in this, that it is not a general order to buy, if thought best, or if market had an upward tendency, or if there was a probable chance of profit, or any like condition. This telegram is a distinct acceptance of an offer, at a fixed price, of a cargo. Its binding efficacy was not dependent upon any contingency, or rise or fall in the market. If it had been duly delivered, the plaintiffs would have been, at that moment, the purchasers and owners at Baltimore of a cargo of corn at ninety cents, with freight at ten cents. It was not delivered, and the plaintiffs were not at that time and place such owners, as between the plaintiffs and defendants, the plaintiffs were entitled to be, at such price. They would have been such, but for the neglect of the defendants. What is the measure of damages? Clearly not the price paid for the transmission only. Paying that back would be rather in the nature of a rescission of the contract, than damages for its non-performance. And we have before determined, that the special condition was not binding so as to exonerate from all other damages occasioned by neglect or want of common care and attention in the performance of the contract and duty assumed.

A more difficult question arises in fixing an exact rule in determining the amount of damages in this case.

The general rule is familiar, and is among the rudimental axioms of the law.

In this State, the general doctrine was laid down at an early day in *Miller v. Mariner's Church*, 7 Greenl. 51, 20 Am. D. 341, in an opinion of the court drawn by Mr. Justice WESTON in his usually clear, discriminating, and accurate style, and precision in use of language. "In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, and deducible from the non-performance, are not allowed. And if the party injured has it in his power

to take measures by which his loss is less aggravated, this will be expected of him. If the party entitled to the benefit of a contract can protect himself from loss, arising from a breach, at a trifling expense, or with reasonable exertion, he is bound to do so."

The above extract, as it seems to us, contains the substance of the whole law applicable to this subject, and the germ from which long chapters and long opinions have been expanded. It is constantly cited as an early and authoritative statement of the legal rule on this subject.

The principles and rules laid down in this case have been re-affirmed in our court in many cases. In *Berry v. Dwinel*, 44 Maine, 255, it is held that "remote and consequential damages, possible gains, and contingent profits are not allowed." The rule was applied in this case to possible or actual loss to plaintiff in the future, which the defendant set up as a defense to recovery of damages, for non-delivery of logs at a stipulated price and time.

Perkins v. P. S. & P. R. R., 47 Maine 592, 74 Am. D. 162; *Ripley v. Mosely*, 57 Id. 76, and cases there cited. In that case it was held, that when the loss is not speculative nor dependent upon contingencies, but is one of the natural and direct results of the act, it may be recovered. But loss of probable profits is too uncertain and problematical to be a basis for estimation of damages.

In an English case, *Hamlin v. G. N. Railway*, 1 H. & N. 408, it is laid down as a general principle, that no damages can be given on contracts, which cannot be stated specifically.

Redfield, in his chapter on Telegraph Companies, § 1896, thus states it as applicable to such companies: "The company must make good the loss resulting from any default on their part." But what loss? Can a party recover for every loss, or injury which he can show, by facts subsequently occurring, did in truth result to him from the failure of duty on the part of the other party?

The clear preponderance and weight of the decisions are, that the qualification, which was thought formerly to be sufficient to meet all cases, is not satisfactory. That qualification was, that the injury must be the ordinary, natural, or even necessary result of the breach. But loss of profits may be clearly shown to have been occasioned by the failure, and from no other cause. So injury and loss may be directly traced to the same cause, when the party is prevented from availing himself, by this breach of one contract, of some other collateral, and independent contract entered into with other parties. Or where a

party has been prevented from doing some act, or making some investment in his own business, not necessarily connected with the agreement in question.

These damages are disallowed, not because they cannot be traced directly as the immediate and undoubted effect of the breach, but because they are in their nature uncertain and contingent, and, perhaps more decidedly, because they are not such as would naturally flow from such a breach, and could not fairly be considered as having been within the contemplation of the parties at the time of entering into the contract. This rule necessarily excludes all remote, speculative, and uncertain results, as well as possible profits, advantages, and other like consequences which might have arisen, or which it can be shown would have arisen from the performance of the contract. This seems to be the doctrine in other States and in England. *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. D. 162; *Griffin v. Colver*, 16 N. Y. 490, 69 Am. D. 718; *Leonard v. New York Telegraph Co.*, 41 Id. 544, 1 Am. Rep. 446; *Freeman v. Clute*, 3 Barb. 426; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. D. 250; *The Sch. Lively*, 1 Gall. 315; *Graham v. Western Union Telegraph Co. (Colorado)*, before cited; *Hadley v. Baxendale*, 26 Eng. Law & Eq. 398, a leading case on resulting damages. Other English and American cases might be cited, bearing more or less directly on the subject. They can be found collected in *Sedgwick on Damages*, and other text-books.

But the negation of certain elements still leaves the true rule undetermined. This, we think is to be found in the application of the principle, which, excluding all uncertain, problematical and contingent profits, holds the party liable for the immediate and necessary result of the breach, and which may fairly be presumed to have been in contemplation of the parties at the time, and are capable of being definitely ascertained by reference to established market rates.

Now, in the case before us, the plaintiffs should have had, at the time when the dispatch should have been delivered, a cargo at ninety cents and freight at ten cents. The natural consequence of this neglect, one which might well be anticipated or be in contemplation of the parties, was that the bargain would be lost, and that the cargo might be sold to other parties, or the seller would decline to accept a repetition of the offer, afterward, at same price. Plaintiffs wanted the cargo and had a right to have it at the price named. What was the damage?

Here comes in the second proposition in *Miller v. Mariner's Church*, viz., that the party should not at once abandon all attempts to procure the corn, and rest upon a claim for indefinite

and possible profits which he might have made by a rise in the market, if he had obtained the article at the time, but must use reasonable diligence, after notice of the failure, to procure the same quantity, and the lowest freights, at the then market rates.

The sum, therefore, which would be a compensation for the direct loss and injury sustained by the non-delivery of this message, is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise, and the same rule applies to any increase of freight from the sum named, if it be shown that the corn could have been shipped by the sellers, at that rate, if the telegram had been duly received.

The case of *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. D. 162, adopts this view, in a case very nearly resembling this in its facts.

Rittenhouse v. Independent Line of Telegraph, 1 Daly (N. Y.), 474, where the operator made a mistake in the article ordered, it was held that the company must make good the difference between the price of the article actually ordered, at the time when ordered, and the price of the same article, if purchased as soon as the mistake was discovered.

United States Telegraph Co. v. Wenger, 55 Penn. St. 262, 93 Am. D. 751. An order to buy stocks; no reason given why not delivered; a case of negligence; stocks ordered not bought on the day; they would have been, if telegram had been received, but were purchased three days afterward at an advance. That difference, the court say, is undoubtedly the damages the plaintiff has sustained and is entitled to recover. "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it." *Leonard v. New York Telegraph Co.*, 41 N. Y. 544, before cited, a case of mistake; *Griffin v. Colver*, 16 N. Y. 490, 69 Am. D. 718; *DeRutte v. N. Y. Al. & B. R. Tel. Co.*, 1 Daly, 547; *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, 73 Am. D. 589.

In our own State, in the case of *Berry v. Dwinel*, before cited, the rule, in an analogous case, is thus stated: "When a party contracts to deliver goods at a particular time and place, and no payment has been made, the true measure of damages is the difference between the contract price and that of like goods at time and place where they should have been delivered."

And so it has been held that a common carrier, who unrea-

sonably delays to transport or deliver goods intrusted to him, will be held to pay the difference between the market value at time and place when and where they ought to have been delivered, and the market value at that place on day of actual delivery. And this although no special contract as to time, and no special intended use, and no deterioration in the quality of the article. *Cutting v. G. T. R. R.*, 13 Allen, 381. The same decision has been made by this court in *Ball v. Railroad*—not reported. See *Weston v. G. T. R. Co.*, 54 Me. 376, 92 Am. D. 5.

APPLETON, C. J., delivered a dissenting opinion.

169. AYER V. WESTERN UNION TELEGRAPH CO.,

79 Me. 493; 10 Atl. R. 495; 1 Am. St. R. 353. 1887.

By Court, EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800M laths delivered at your wharf two net cash. July shipment. Answer quick." It will be seen that the important word "ten," in the statement of price, was omitted.

The Philadelphia party immediately returned by telegraph the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterward passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to-wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the

company. In the absence of evidence on that point, we must assume that for such an error the company was in fault: *Bartlett v. Tel. Co.*, 62 Me. 221, 16 Am. R. 437.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds:—

1. The company relies upon a stipulation made by it with the plaintiff, as follows: "All messages taken by this company are subject to the following terms: to guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission, or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

Is such a stipulation in the contract of transmission valid as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void.

Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the busi-

ness voluntarily. They have the entire control of their servants and instruments. They invite the public to intrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought without qualification to do it carefully, or be responsible for their want of care.

It is true, there are numerous cases in other states holding otherwise, but we think the doctrine above stated is the true one, and in harmony with the previous decisions of this court: *True v. Tel. Co.*, 60 Me. 9, 11 Am. R. 156; *Bartlett v. Tel. Co.*, 62 Me. 221, 16 Am. R. 437.

2. The defendant company also claims that the plaintiff was not, in fact, damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender and intrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important, and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from

his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee v. Vermont C. R. R. Co.*, 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract binding on the sender. In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are *dicta* to the same effect in *Wilson v. M. & N. R'y Co.*, 31 Minn. 481, 18 N. W. R. 291, and *Howley v. Whipple*, 48 N. H. 488.

Telegraph Company v. Shotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred

turpentine at sixty-four." As received from the telegraph company it read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The court held, however, that there was a completed contract at sixty, that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

Judgment for plaintiff for eighty dollars, with interest from the date of the writ.

170. WEBBE V. WESTERN UNION TELEGRAPH CO.,

169 Ill. 610; 21 N. E. R. 4; 61 Am. St. R. 207. 1897.

MAGRUDER, J. Upon the blank form, containing the telegraphic message delivered by Haas to the appellee's operator at Montgomery, Alabama, there were printed in small type certain conditions, among which was the following: "The company will not hold itself liable . . . in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

Upon the back of the blank form, upon which the dispatch as delivered to appellant in Chicago was written, certain stipulations and conditions were printed, the last of which was as follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is contended by appellee that the claim here sued upon was not presented in writing within the sixty days named in the printed conditions. It is not altogether clear, under the evidence in this case, that the claim was not presented in writing within sixty days as required by the condition. On February 7, 1893, one of the attorneys of the appellant wrote a letter to an officer of the appellee company. Although this letter stated that the claim for damages was made against appellee on behalf of I.

H. & J. C. Haas, yet the letter explained fully the nature of the alteration which was made in the dispatch, and the nature of the claim based upon the loss incurred by reason of that alteration. But whether the claim was presented in writing within the sixty days or not, it seems to be conceded that the action of the court in instructing the jury to find for the defendant was based upon the conclusion that the claim was not presented in writing within the time named.

The question in the case is, whether the court erred in taking the case away from the jury. The further question involved is, whether the failure to present the claim in writing within the sixty days, if there was such failure, constitutes a defense against the present action. It is not denied that the company was guilty of negligence in delivering the dispatch as altered, instead of delivering it as originally sent. At any rate, no contest is made upon the question as to whether there was such negligence or not. Counsel for appellee confine themselves in their brief to the proposition that, for want of a claim in writing within sixty days after the dispatch in question was sent, appellant's right of recovery is barred.

It is to be noted that this suit is not brought by Haas, the sender of the dispatch, but by Webbe, the receiver of the dispatch as changed. The dispatch, as sent, is signed by the sender, but the dispatch, as received, is not signed by the receiver. The question then arises, whether any difference exists between the right of recovery by the sender of the dispatch and the right of recovery by the receiver of the dispatch, so far as these printed conditions upon the blank forms are concerned. We have held that the relation of contract exists between the sender of the dispatch and the telegraph company, but that no relation of contract exists between the receiver of the dispatch and the telegraph company; and that the proper remedy of the receiver of the dispatch for damages on account of its alteration is an action in tort: *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248, 21 N. E. R. 4, 15 Am. St. R. 109. Ordinarily, where a shipper of goods, or the sender of a telegraphic dispatch, is held to be bound by stipulations or conditions printed upon the blank form of a receipt, or bill of lading, or dispatch, it is upon the ground that the person so bound signs the document containing the conditions, and makes a contract with the company, which is to carry his goods or transmit his message. It would seem to be clear, however, that such conditions and stipulations would not have the same binding effect where, as here, no contract relation exists.

In a case where a suit in assumpsit for damages was brought

by the sender of a dispatch against the telegraph company, we held that the telegraph company is a servant of the public, and bound to act whenever called upon, its charges being paid or tendered; that such companies are, in this respect, like common carriers, and, though not regarded, like common carriers, as insurers of the safe delivery of every message intrusted to them, yet their duty is to transmit correctly the message as delivered; that they are bound to the use of due and reasonable care, and liable for the consequences of carelessness or negligence, in the conduct of their business; that where a party desiring to send a telegraphic dispatch is required by the company to write his message upon a paper, containing a condition exonerating the company from liability for an incorrect transmission of the message unless it shall be repeated and at an additional cost therefor to the sender, such a restriction, even if regarded as a contract, is unjust, without consideration, and void; that it is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence by contract; that, notwithstanding any special condition which may be contained in a contract between a company and the sender of a message respecting the liability of the former in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by its own fault; that it will depend on circumstances whether a paper, furnished by the company on which the message is written and signed by the sender is a contract or not; that it is a question for the jury to determine, as a question of fact, upon evidence *aliunde*, and from all the circumstances attending the signing of the paper, whether or not the sender of the dispatch has knowledge of its terms and assents to its restrictions: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38. The Tyler case distinctly held that assent by the sender of the dispatch to the printed terms and conditions upon the blank form must be shown, in order to make such terms and conditions binding as a contract upon the sender. The doctrine of the Tyler case has been subsequently indorsed and approved by this court: *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248, 21 N. E. R. 4, 15 Am. St. R. 109.

If assent to such terms and conditions is necessary to bind the sender of the dispatch, surely assent to such terms and conditions, as printed upon a dispatch delivered, will be necessary to bind the receiver thereof. The receiver of the dispatch will certainly not be bound by a provision thereon, requiring a claim to be presented within sixty days, in the absence of proof that he assented to such a provision: *Western Union Tel. Co. v. Fair-*

banks, 15 Ill. App. 600; Western Union Tel. Co. v. De Golyer, 27 Ill. App. 489; Western Union Tel. Co. v. Lycan, 60 Ill. App. 124.

It is said, however, that the requirement that the claim should be presented within sixty days is a reasonable requirement, and that a party suing for damages will be bound to show that he has complied with such requirement, if he had notice or knowledge of the same, or if there were any circumstances of such a character as to affect him with such notice or knowledge. Upon an examination of the authorities, it will be found that, in most cases where the provision in regard to the limit of sixty days has been held to be reasonable, and notice or knowledge of the same has been held to be binding upon the plaintiff in the suit, the controversy has been between the sender of the dispatch, and the telegraph company. Such doctrine, however, has no application as between the receiver of the dispatch, whose suit is in tort against the company for negligence in the performance of a public duty, and the telegraph company. From the rule that assent is necessary to make such a condition as the sixty day limit binding, it necessarily follows that mere notice or knowledge of such condition will not affect the receiver of the dispatch. It is against public policy that a telegraph company may adopt rules, regulating its relations with its patrons, which, if they are reasonable, shall be binding upon such patrons without their assent, if they only have knowledge. Counsel for appellee refer to the case of *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596, as supporting the doctrine contended for by them; but "there is in that case (*Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 18 Am. Rep. 596) no departure from the uniform decisions of this court, that a carrier cannot be released from the duties and liabilities annexed to its employment, unless the shipper assents to the attempted restrictions": *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191.

Some of the cases seem to hold that the printed conditions upon blank forms of telegraphic dispatches, including the one in reference to the limit of sixty days, are mere regulations, and not contracts between the sender of the message and the telegraph company. The force of the distinction thus sought to be made lies in the fact that, if the conditions or stipulations are considered as mere regulations, the assent of the sender to them is not necessary, but that he will be bound if they are brought home to his knowledge; whereas, if they are held to be parts of a contract, the assent of the sender must be shown in order to bind him: *Croswell on Law of Electricity*, sec. 493. But what-

ever may be the correct view of these conditions as being regulations or contracts where the controversy is between the sender of the dispatch and the telegraphic company, we are of the opinion that such distinction has no application where the controversy is between the company and the receiver of the dispatch: *Croswell on Law of Electricity*, sec. 540. There is no proof of contract between the telegraph company and the person to whom the message is addressed, and, therefore, he could not be held bound by these conditions or stipulations: *Croswell on Law of Electricity*, sec. 504, and cases cited in note 2.

Counsel for appellee rely mainly upon the case of *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W. 732, as authority for the position that such conditions and stipulations, including the limit of sixty days, are binding upon the receiver, as well as the sender, of the dispatch. But we are not inclined to assent to the doctrine of the Tennessee case. The author of the opinion in that case refers to cases holding that the addressee of the message is not bound by the stipulation as to the sixty day limit, because he did not make the contract; and also to cases holding to the contrary, and says that it is not necessary to determine, in the case there under consideration, where the weight of authority lies. The conclusion announced in that case rests mainly upon two considerations, namely: 1. That where the receiver of the message is a patron of the company, he will be presumed to have knowledge of the form of the contract embodied in the blanks used; 2. That the receiver's right to recover rests entirely upon the contract of sending, and upon the principle that, where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right. We are unable to see that these considerations can have any influence, where the action brought by the receiver of the dispatch is an action in tort for damages for the careless and negligent performance of a public duty.

The opposite view from that contended for by counsel for appellee is supported by respectable authority, and is in harmony with the decisions heretofore rendered by this court, and is a natural corollary from such decisions. *Gray on Communication by Telegraph*, at section 75, says: "The printed matter upon the blank form, upon which a message is delivered at the place of destination, acquaints the receiver usually with the fact that the telegraph company will not be liable for a loss in any case in which claim for that loss is not presented in writing within sixty days after sending the message. As the receiver's right of action is purely one in tort, it is difficult to see how the telegraph company can arbitrarily compel a claim for loss to be

made within any particular time. The general rule is, that an action of tort can be brought without other notice at any period within the time allotted to it by the statute of limitations.' Upon this subject the supreme court of Nebraska says: "The clause printed on the telegraph blank to the effect that the telegraph company would not be liable for damages in any case, unless the claim was presented in writing in sixty days, was and is unreasonable and wholly without consideration if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. . . . The attempt, so often indulged in by insurance and telegraph companies to prescribe for themselves a law, is not one that appeals to the judgment, or commends itself to the conscience of this court": *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. R. 1057, 40 Am. St. R. 490.

Croswell, in his work on the Law Relating to Electricity, section 557, says: "In actions of tort by the addressee of the message, it is difficult to see how any limit of time, in which claims must be made against a telegraph company for damages occasioned by error or negligence in sending the message, can affect the plaintiff. In such cases, the plaintiff has no privity with the sender of the message, but sues solely for the breach of duty by the telegraph company, i. e., the failure of the telegraph company to perform its public duty of transmitting dispatches promptly and with due care, and has nothing to do with the special contract between the sender and the telegraph company, and, therefore, whatever stipulations the sender may make with the telegraph company should not bind the addressee."

The learned author of the article on Telegraphs and Telephones, in volume 25 of the American and English Encyclopedia of Law, pages 807, 808, says: "Other authorities hold that the receiver's action is not on the contract, but for the tort, i. e., for the breach of the company's public duty. Under this view of the rule, the stipulations in the original contract can have no binding effect upon the receiver's action. As a matter of fact, the telegraph companies endeavor to incorporate the stipulations into the message as delivered, but as the receiver does not attach his signature thereto, they are of no effect, unless it can be shown that they were brought to his notice and assented to by him": *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. R. 1057, 40 Am. St. R. 490; *W. U. Tel. Co. v. McKibben*, 114 Ind. 511; *W. U. Tel. Co. v. Longwell*, 5 N. Mex. 308; *Herron v. Western Union Tel. Co.*, 90 Iowa, 129; *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362; *De la Grange v. Southwestern*

Tel. Co., 25 La. Ann. 383; Harris v. Western Union Tel. Co., 9 Phila. 88.

It is well settled that, even if the stipulation in question would be binding upon the receiver of the dispatch in case of an assent thereto, it is a question for the jury to determine whether there was such assent or not; and, even if mere notice or knowledge of the stipulation would bind the receiver of the dispatch, the question whether such receiver had notice or knowledge is a question of fact to be determined by the jury from all the facts and circumstances in the case: Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Boscowitz v. Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Croswell on Law of Electricity, sec. 546.

In the case at bar, the appellant swore that he had never read the printed matter on the blank received by him, and never knew what it was; that he had never heard of the sixty-day condition until a few days before testifying; and that he did not know what the terms of the conditions upon the blank form were, and had not only never read them but had never heard them talked about. The evidence, it is true, showed that, for a number of years, the appellant had been conducting his business correspondence by telegraph, and that most of it had been conducted over the lines of the appellee, and that he had received and sent most of the telegrams upon the blanks of the appellee. This proof did not authorize the court below to take the case from the jury, and direct them to find for the defendant. Even if the circumstance that appellant had used the blank forms of the appellee for a number of years had a tendency to show his notice or knowledge of the conditions printed thereon, yet it was for the jury to say what effect should be given to such circumstances, considered in connection with all the other testimony in the case. Where certain consignees were frequent shippers by a certain line, and were in the habit of receiving bills of lading with certain conditions therein, a presumption was held to arise that such consignees were familiar with the contents of the bills of lading. The presumption of such familiarity, however, would only arise out of the fact of the use of the blanks where there was no evidence to the contrary. The presumption that thus arises is not conclusive: Merchants' Dispatch etc. Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541. Here, whatever presumption may have arisen against the appellant, in favor of his familiarity with the terms of the conditions printed upon the blank used by him, was rebutted by his sworn statement, that he had never read the terms of those conditions, and did not know what they were. Certainly, it was the duty of the

court to leave it to the jury to say whether or not he assented to the condition in regard to the limit of sixty days.

For the error in taking the case away from the jury and instructing them to find for the defendant, the judgments of the appellate court and of the circuit court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

171. GRINNELL V. WESTERN UNION TELEGRAPH CO.,

113 Mass. 299; 18 Am. R. 485. 1873.

Counts in contract and in tort joined for breach of a contract, and negligence in transmitting a telegraph message to an insurance company for renewal of insurance, and calling for an answer. The operator omitted the word "answer," and plaintiff thereupon effected new insurance at a cost of \$35. In addition he was obliged to pay the first company \$35, which sum he alleged as his damages. The message was written on a printed blank requiring repetition of the message and payment of an additional sum if the telegraph company were to insure correct transmission. The court below ruled that the action could not be maintained for more than twenty-five cents, the charge for sending the message.

GRAY, C. J. The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or de-

liver which, has no relation to any value which can be put on the message itself.

The duty of a telegraph company, as defined in our statutes, is that it "shall receive dispatches from and for other telegraph lines, companies and associations, and from and for any person; and on payment of the usual charges for transmitting dispatches, according to the regulations of the company, shall transmit the same faithfully and impartially." Gen. Stats., c. 64, § 10.

The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company. *Ellis v. American Telegraph Co.*, 13 Allen, 226; *Redpath v. Western Union Telegraph Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164, 71 Am. D. 461; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. D. 519; *Breese v. United States Telegraph Co.*, 48 N. Y. 132, 8 Am. Rep. 526.

Such a regulation does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmission and delivery of the message to be of such importance to him that he proposes to hold the company responsible in damages, for a non-fulfillment of the contract on its part, beyond the amount paid for the message, to increase that payment by one-half. Even a common carrier has a right to inquire as to the quality and value of goods or packages intrusted to him for carriage, and is not liable for goods of unusual value if false answers are made to his inquiries. *Phillips v. Earle*, 8 Pick. 182; *Dunlap v. International Steamboat Co.*, 98 Mass. 371, 377, 378.

In the leading case in this Commonwealth of *Ellis v. American Telegraph Co.*, the action was brought for an error in transmitting a message, by substituting the words "seventy-five" for "twenty-five;" and there was no evidence of carelessness or negligence, except this error, which was made by some agent of the company in transmission. The defendants requested the

judge who presided at the trial to instruct the jury that on these facts they were not liable. But the judge ruled that, notwithstanding the terms and conditions set forth in the printed heading of the message (which were substantially like those in the case at bar), the defendants were bound, in transmitting the message, to make use of ordinary care, attention and skill, and were liable for damages arising from inattention or carelessness in such transmission, and not produced by any unexpected or unforeseen accident; and that the difference between the message received and that actually delivered was *prima facie* evidence of the want of ordinary care, attention and skill on the part of the defendants. 13 Allen, 226-228.

Upon exceptions to that ruling, the court held that, in the business of transmitting messages by telegraph, as in the ordinary employments and occupations of life, men were bound to the use of due and reasonable care, and were liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby; but that this rule did "not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of the business, or establishing special stipulations for the performance of service, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common law, and to protect them from being held responsible for unusual or peculiar hazards which are incident to particular kinds of business." It was further said: "Of course, a party cannot in such way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents." "But he may to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the amount of his compensation, according to the risk which he assumes, as well as by the nature of the service which he renders." 13 Allen, 234. It was held that the regulation in question was reasonable and valid; that "the defendants were entitled to insist on a compliance with that part of their regulations which required that the message should be repeated, and that the extent of the risk should be made known to them, if they were to be held to insure the safe and correct transmission of the message, or, in case of failure, to be responsible for all the damages consequent on delays or errors." And the court declared that it was mainly for these reasons that the instructions to the jury could not be supported. 13 Allen, 235-237.

Although that action was by the receiver of the message, he was treated throughout the case as claiming through the con-

tract, of which he had notice, made with the company by the sender of the message. No allusion was made, in the judgment of this court, to the nature of the error in the message, or to its effect as evidence of negligence on the part of the company. Nor was it suggested that there was any insufficiency in the proof of negligence; and there was nothing before this court upon which such a point could have been decided; for the question whether the substitution of "seventy" for "twenty" was or was not of itself proof of negligence, depended upon the plainness of the writing of the original message, which could only be ascertained by inspection, and which was a pure question of fact to be determined by the jury or the court below.

As the instructions at the trial of that case did not allow the plaintiff to recover without proof of negligence to the satisfaction of the jury, the judgment of this court, sustaining the exceptions to those instructions, is a direct adjudication that the regulations in question exempted the company from liability for ordinary negligence where the message had not been repeated and the additional charge paid.

We have been led to make the fuller statement of that case, because its scope and effect appear to us to have been misapprehended in *Sweatland v. Illinois & Mississippi Telegraph Co.*, 27 Ia. 433, 1 Am. Rep. 285, which is the only decision, cited at the bar, inconsistent with the law upon the subject as declared by this court.

In *Western Union Telegraph Co. v. Buchanan*, 35 Ind. 429, 1 Am. Rep. 744, the action was not for damages, but for a penalty imposed by statute, which could not of course be restricted by the contract of the parties; and it was assumed that in the case of a message not repeated in accordance with the rule, the company would not be liable for damages beyond the amount stipulated, except in case of gross negligence. In *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. Rep. 156, the regulation which was held invalid purported wholly to exempt the company, in case of messages sent by night, from any liability beyond the amount received; and the opinion of the majority of the court appears to be founded on a false analogy between telegraph companies and common carriers, and is opposed by a very able dissenting opinion of Chief Justice APPLETON. In *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. D. 157; and in *Leonard v. New York, Albany & Buffalo Telegraph Co.*, 41 N. Y. 544, 1 Am. Rep. 446, there was no regulation limiting the liability of the corporation against which the action was brought. In *New York & Washington Telegraph Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. D. 338, the action was

by the receiver of a message, who had no notice of the regulation; and was in substance not founded upon contract, but upon a misrepresentation by the company employed to send the message, by which the receiver was misled and injured. See *Ellis v. American Telegraph Co.*, 13 Allen, 226, 238; *May v. Western Union Telegraph Co.*, 112 Mass. 90, 95.

In the case at bar, the form of the dispatch, delivered by the defendant's agent to the plaintiff, and filled up and signed by the latter, constituted the contract between the parties. The plaintiff, having thus expressly agreed that, if he did not order the message to be repeated, the liability of the defendant for mistakes or delays in its transmission or delivery should be limited to the sum paid, and not having ordered it to be repeated and paid the increased rate required in case of repetition, could not charge the defendant for liability, beyond the amount originally paid for the transmission of the message, for a mistake in the transmission, at least without proving willful default or gross negligence on the part of the company.

There was no offer at the trial to show any wanton disregard of duty or gross negligence on the part of the company or its agents. The offer to prove that "there was negligence on the part of the operator," in not sending the whole message received, must be understood to mean want of ordinary care. No question therefore arises whether the company could be charged by reason of gross negligence, as held in *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. D. 519, and suggested in *Ellis v. American Telegraph Co.*, 13 Allen, 226, 234.

The offer of the plaintiff to prove that the repeating of the message as received by the operator of the telegraph at Boston, to the operator at New Bedford, by whom it was sent, would not have disclosed the omission in the message, was rightly rejected as immaterial. The report does not show how such evidence could possibly have proved that fact. But the conclusive answer to it is that the plaintiff, having omitted to fulfill the condition, on which alone, by the terms of the express contract between the parties, he could recover for any mistake in transmission more than the amount of his original payment, cannot be permitted to prove that his own failure to fulfill his contract did not affect the result. The *obiter dicta* of Chief Justice BIGELOW in *Ellis v. American Telegraph Co.*, 13 Allen, 226, 238—that it would be a question of fact for the jury whether the mistake in the dispatch would have been prevented or corrected by the repetition of the message; and that of course the company would be liable for any negligence causing damage, which would not have been prevented by a compliance with the rules—are somewhat

wanting in precision, owing doubtless to the fact that, as he observed, no such question was before the court. They might perhaps apply where the neglect sued for was in a matter not within the terms of the regulations as, for instance, where no attempt at all was made to send the message. *Birney v. New York & Washington Tel. Co.*, 18 Md. 341, 81 Am. D. 607. But that they were not intended to countenance the admission of such evidence as was offered in the present case, upon any point covered by the contract of the parties, is manifest from his statement, only a few lines above, that it might be a sufficient answer to the claim against the company, "that according to the reasonable regulations by which they were governed in the performance of their undertaking toward the plaintiff, and of which he had notice, they have committed no breach of duty for which they can be held liable to him."

The remaining questions may be briefly disposed of. The evidence of usage and understanding was clearly incompetent to vary the terms or effect of the written contract between the parties. The plaintiff's omission to read that contract cannot relieve him from being bound by his signature. *Redpath v. Western Union Telegraph Co.*, 112 Mass. 71, 73, 17 Am. Rep. 69; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *Wolf v. Western Union Telegraph Co.*, 62 Pa. St. 83, 1 Am. R. 387; *Breese v. United States Telegraph Co.*, 48 N. Y. 133, 8 Am. Rep. 526. The subsequent acts and declarations of the defendant's agents, not connected with the transmission of the message, were not competent evidence to charge the defendants. *Mac Andrew v. Electric Telegraph Co.*, 17 C. B. 3; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. D. 519; *Sweatland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Robinson v. Fitchburg & Worcester Railroad Co.*, 7 Gray, 92.

The result is that according to the ruling at the trial and the terms of the report there must be judgment for the plaintiff for 25 cents.

172. WESTERN UNION TELEGRAPH CO. V. VAN CLEAVE,

107 Ky. 464; 54 S. W. R. 827; 92 Am. St. R. 366. 1900.

HAZELRIGG, C. J. The appellee recovered judgment of appellant for the sum of one thousand dollars for mental anguish caused by his inability to attend his brother's funeral, and which nonattendance, he avers, was owing to the negligent failure of

the appellant to deliver to him in a reasonable time a telegram announcing the death of that relative. The message was sent from the appellant's office at Lake City, Missouri, at about 9 o'clock on the evening of January 1, 1894, and reached Lebanon, Kentucky, the place of its destination, at 11:44 o'clock on the same evening. It was not delivered to the appellee until next morning at about 8 o'clock, and too late for the first train out that morning. It may be assumed, for the purposes of the case, that the failure of appellee to get the train was the sole cause of his not attending the funeral.

The appellant resists recovery on the grounds: 1. That mental anguish, accompanied by no physical injury, gives no cause of action; 2. That the message was a "night" message, and, according to the terms indorsed on the blank on which it was written, was to be delivered "not earlier than the morning of the next ensuing business day"; and 3. That its office at Lebanon during the night was in charge of an operator, who was also the agent and night operator for the railroad company, and the rules of his employment forbid his leaving the office at night for any purpose; that a delivery boy was kept only from 6 o'clock A. M. until 6 o'clock P. M., because the business did not justify night delivery.

Other minor defenses were presented, but, as we shall see, they need not be considered.

The ground first suggested has furnished the occasion for much controversy, and much conflict of authority. It is probably in accordance with the views of a majority of the state courts that mental anguish and injured feelings alone, and unaccompanied with physical injury, do not furnish ground for recovery. But in this state the rule has been announced otherwise: *Chapman v. Western Union Tel. Co.* (1890), 90 Ky. 265, 13 S. W. R. 880.

And so likewise a recovery in this class of cases can be had under the decisions of the states of Texas, Alabama, Indiana, Iowa, North Carolina, and Tennessee. It may be admitted that there are difficulties in the way of an exact measurement of such damages, but it does not seem to us that this is a sufficient reason why a negligent public carrier should escape with merely nominal damages. The same difficulty of accurately measuring such damages arises in cases of slander, breach of marriage contract, and in cases where mental suffering is accompanied with physical pain.

If, as argued, the law does not deal generally with the feelings and emotions, it may be answered that here the parties themselves have contracted with respect to those very things,

or, at least, have contracted with respect to those things which naturally affect the feelings and emotions.

For the purpose of having him attend, a message is sent to a son, informing him of his mother's death, and the date of her funeral and burial. It must be supposed that a failure to deliver such a message will cause mental suffering; and this suffering is, therefore, a consequence or result within the contemplation of the parties. This is true whether the carrier is sued on its contract or because of its failure to perform a public duty as a common carrier of intelligence.

It is an old doctrine that, "when the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it": *Hadley v. Baxendale*, 9 Ex. 341.

The rule is certainly not less comprehensive if applied as a test for the ascertainment of the liability of a common carrier who may violate its public duty. The subject matter of the undertaking by the carriers is not of a pecuniary nature, and the breach of the undertaking cannot be measured by an attempted ascertainment of what money is lost by reason of the breach. As the question, however, must be regarded as a settled one in this state, we need not elaborate this branch of the case further. The doctrine is fully supported in the recent well-considered cases of *Mentzer v. Western Union Tel. Co.* (1895), 93 Iowa 752, 62 N. W. R. 1, 57 Am. St. R. 294, and *Cashion v. Tel. Co.* (1898), 123 N. C. 270, 31 S. E. R. 493, where all the cases are collated.

We are of the opinion, however, that the second and third points suggested are conclusive against appellee's right of recovery. While the nature of his action is in tort, and not on a contract—as he had none with the company—he cannot recover if the company has complied with the terms of its contract and undertaking with the sender of the message, provided, indeed, those terms are such as may reasonably be imposed and agreed upon. That night messages are a business necessity, and contracts of the kind made here for delivery of such messages on the next morning after sending them may be made, cannot be doubted in the face of the authorities and on principle: *Hibbard v. Tel. Co.*, 33 Wis. 558, 14 Am. R. 775; *Fowler v. West-*

ern Union Tel. Co., 80 Me. 381, 15 Atl. R. 29, 6 Am. St. R. 211, and cases cited.

The contract enables the sender to get cheaper rates, and yet have his message delivered in time to be acted upon the next morning; and it enables the company to send the message during the odd hours of the night, when business is not pressing, and when it may furnish the service at a cheaper rate. The court below, therefore, erred in striking this plea from the company's answer.

We think it likewise competent for such companies to establish reasonable hours within which their business may be transacted, and they may fix those hours with reference to the quantity of business done. They may not be required to employ both a day and a night messenger, if it be apparent that the business of the office will not justify such employment. This we understand to be the rule everywhere: *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. R. 172; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. R. 489; *Western Union Tel. Co. v. McCoy*, Tex. Civ. App., Apr. 3, 1895, 31 S. W. R. 210. Under the proof on the points last named, the law is for the defendant, and a peremptory instruction should have been given.

Wherefore the judgment is reversed for proceedings not inconsistent with this opinion.

173. LEAVELL V. WESTERN UNION TELEGRAPH CO.,

116 N. C. 211; 21 S. E. R. 391; 47 Am. St. R. 798. 1895.

Appeal from penalty imposed on defendants by railroad commissioners for violation of schedule tariff rates for telegraph messages.

CLARK, J. In *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 111 N. C. 463, 16 S. E. R. 393, 32 Am. St. R. 805, this court affirmed the constitutionality of the act (Acts 1891, c. 320) establishing the Railroad and Telegraph Commission. In *Mayo v. Western Union Tel. Co.*, 112 N. C. 343, 16 S. E. R. 1006, it sustained the power of such commission, under section 26 of said act, to establish rates for telegraph companies. In *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. R. 389, the court held that telegraphic messages transmitted by a company from and to points in this state, although traversing another state in the route, do not constitute interstate com-

merce and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the supreme court of the United States, delivered by Fuller, C. J., in *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. R. 806. To the same purport, *Campbell v. Chicago etc. Ry. Co.*, 86 Ia. 587, 53 N. W. R. 351.

In the present case the commission find as a fact that "the defendant has a continuous line by which messages may be transmitted from Wilson to Edenton and other adjacent points in North Carolina, but this line traverses a part of the state of Virginia, passing through the city of Norfolk"; and it properly holds upon the evidence "that the telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that as the defendant could have sent the message the whole distance over its own line it cannot be heard to say that it did not do what it ought to have done, and thus collect fifty cents for the message instead of twenty-five, as allowed by the commission tariff. The defense set up that in fact it only carried the message to Norfolk and then paid another company to forward it to Edenton, cannot be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton, and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employee. It is not a mere private business, but a public duty which the defendants by their franchise are authorized to discharge. It is further to be noted that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville, and Hertford on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer and against the public at large, as was intimated in *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. R. 389. The findings of fact in evidence are fuller, and present a somewhat different and stronger case against the defendant than in *Albea's case*. By section 11 of the defendant's contract with the railroad company the defendant remains owner of the telegraph line to Edenton, North Carolina, and its belongings, which are to remain "part of its general

telegraph system” and “to be controlled and regulated by the telegraph company.” Section 3 of the contract gives the railroad messages precedence over commercial business, but stipulates that when railroad business shall require the exclusive use of one wire the telegraph company shall, on sixty days’ notice, furnish material for a second wire, which second wire shall be used for railroad business exclusively and such commercial business as can be done without interfering with railroad business. Section 6 provides that where the railroad company shall open offices, the operators “acting as agents of the telegraph company” shall receive such commercial and public telegrams as may be offered, collecting rates prescribed by the telegraph company, and render monthly statements and pay over the receipts to the telegraph company. Section 7 provides that whenever the volume of business at any point justifies it, the telegraph company shall put in an additional operator. It will be thus seen that the line to Edenton is an integral part of the defendant’s general telegraph system. It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot subtract itself from obedience to the rates prescribed by the authority of the state, acting through the commission, by a contract giving one customer, the railroad, preference in business, and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common knowledge does not exceed ten dollars per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the commission was established to prevent. In *Railroad Commission v. Western Union Tel. Co.*, 113 N. C. 213, no commercial message was tendered, and the point now decided was not presented by the record.

The ruling of the commission is in all respects affirmed.

174. HARKNESS V. WESTERN UNION TELEGRAPH CO.,

73 Ia. 190; 34 N. W. R. 811; 5 Am. St. R. 672. 1887.

Action for loss due to delay in delivering a telegram. Judgment for plaintiff.

SEEVERS, J. The material facts are that the plaintiff is a resident of the state of Iowa, and had a suit pending in the state of Nebraska, which it was expected would be reached for trial on the thirtieth day of October, 1884. W. C. Sloan, one of the plaintiff's attorneys, was a resident of the state of Nebraska, and A. M. Walters was also her attorney, who, however, was a resident of the state of Iowa. Both said attorneys were expected to take part in the trial of the suit. The plaintiff intended to start from her home in Iowa with her witnesses and attorney on the morning of the 29th of October, so that she could be present when the case was called for trial on the following day. During the night of the 27th of October a message was delivered to the defendant in these words:—

“FAIRMOUNT, NEB., October 5, 1884.

“To A. M. WALTERS, Villisca, Iowa: Do not come till November 5th. Court adjourned till then.

“W. C. SLOAN.”

Such message was a half-rate or night message, and Sloan paid the defendant forty cents for transmitting the same. The message was received at Villisca, October 28th, about one o'clock, A. M., at which place Walters resided, but was not delivered to him until October 31st. Plaintiff started to Nebraska on October 29th, with her witnesses and attorneys, and thereby incurred expenses, which she paid, and this action is brought to recover the same of the defendant, who had no knowledge for what purpose the message was sent, other than is disclosed on its face. Nor had the defendant any knowledge that Sloan was acting for the plaintiff, or that she had a suit pending in Nebraska. The contract was made with Sloan, and is attached to the message, the material portion of which is as follows:—

“(Form No. 45.)

“THE WESTERN UNION TELEGRAPH COMPANY.

“*Night Message.*

“The business of telegraphing is subject to errors and delays arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half-price extra is charged in addition to the full tariff rates. The Western Union Telegraph Company will receive messages, to be sent without repetition, during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but

in no case for less than twenty-five cents toll for a single message, and upon the express condition that the sender will agree that he will not claim damage for errors or delays, or for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message."

1. It is objected that the court erred in rendering judgment for the plaintiff, because the message was neither sent by nor to her, and no contract was made with her. The court was justified in finding that both Sloan and Walters were the agents and attorneys of the plaintiff, and that the telegram was sent by one of them, and received by the other, for the use and benefit of the plaintiff. Therefore she may well be said to be an undisclosed principal, and in such case we understand the rule to be that such principal, as the "ultimate party in interest, is entitled, against third persons, to all advantages and benefits of such acts and contracts of his agents," and the principal may sue in his own name on the contract: Story on Agency, sec. 418; National Life Ins. Co. v. Allen, 116 Mass. 398; Gage v. Stimson, 26 Minn. 64, 1 N. W. R. 806. The fact that the defendant had no knowledge that the plaintiff was in fact principal, and that the telegram was sent for her use and benefit, is immaterial, except that it may be true that the defendant may set up as a defense any matters that would constitute a defense if the suit was brought in the name of the agent, which occurred prior to the disclosure of the principal.

2. It is insisted that the court erred in finding that the defendant was negligent in failing to deliver the telegram earlier than it did. It will be observed that the telegram was received by the agent of the defendant at Villisca, Iowa, on the morning of the 28th of October, and that it was not delivered until the thirty-first day of that month. The court was justified in finding that defendant was negligent, because no excuse whatever for the failure to deliver the telegram on the twenty-eighth day of October is given. The delay was such as to cast on the defendant the burden of explaining the cause of the delay.

3. It is insisted that the contract limits the liability of the defendant, and that the recovery cannot exceed such limit. It has been held that it is competent for a telegraph company to restrict its liability, as was done in this case, but that it cannot contract against its own negligence in failing to transmit and deliver the message: Sweatland v. Illinois etc. Tel. Co., 27 Iowa 433, 1 Am. R. 285; Manville v. Western Union Tel. Co., 37 Iowa 214, 18 Am. R. 8. But it is urged that the contract was made

with Sloan, and that he can only recover the amount stipulated in the contract, for the reason that the money expended by him was the amount paid for the message, and that this is the extent of the plaintiff's recovery, for the reason that she is an undisclosed principal, and not known in the transaction. We do not concur in this proposition, but think that, as the telegram was sent and received for the benefit and use of the plaintiff, she may recover such damages as she has sustained, subject only to any payments in liquidation of damages made by the defendant to Sloan prior to the time defendant had knowledge that the telegram was sent for the use of the plaintiff, and that she was the principal in the transaction.

4. It is further insisted that the plaintiff recovered \$24.52 more than in any event she was entitled to. We deem it sufficient to say that we cannot concur in this proposition.

Affirmed.

175. WESTERN UNION TELEGRAPH CO. V. MITCHELL,

91 Tex. 454; 66 Am. St. R. 906. 1898.

Case, certified by court of civil appeals to determine, among other things, whether the trial court ruled correctly in charging in effect that if the telegraph company could not find the addressee the message should have been delivered to his wife. The telegram read: "Water is getting low. Come out," and was sent to inform plaintiff of danger to his cattle from lack of water. It was alleged that if the message had been delivered within a reasonable time he could have gone to his ranch and made arrangements that would have saved him from heavy losses. The defendant's agent was informed of the danger to the cattle. Plaintiff left home at 10:50 A. M. the day the message was sent, but his wife remained at home in the town all day. On failing to find plaintiff the receiving operator telegraphed the sending operator of the fact and was instructed to deliver the message to a firm of merchants in the town where plaintiff lived.

BROWN, A. J. (After stating the facts, and ruling on questions of pleading and evidence.) There was error in giving the special charge mentioned in the third question. The general rule is expressed by Croswell in his work on the law of Electricity, section 412, thus: "The leading principle as to delivery of a telegram is, that the message is to be delivered to the person to whom it is addressed, and the place of address is subordinate to the person; and, therefore, if the person cannot be found at

the street and number or other place to which the telegram is addressed, but can be found by reasonable efforts of the telegraph company in some other place, it may be negligence for the company to leave the telegram at the place of address without making further efforts to find the absent person and make personal delivery": *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 9 S. W. R. 598, 10 Am. St. R. 772; *Western Union Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. R. 846, 27 Am. St. R. 918; *Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. R. 800; *Pope v. Telegraph Co.*, 9 Mo. App. 283.

If a message be addressed to the care of another, it may be delivered to such person; or if the addressee has taken rooms at a hotel, where it is the custom to deliver mail and such messages, it will be presumed that the clerk is the agent of the guest to receive messages of this character, and a delivery to such clerk will be sufficient.

The wife, as such, is not in law the general agent of her husband, and we know of no principle of law that would justify the conclusion that it was the duty of the defendant to deliver the message in this case to Mrs. Mitchell, nor that such a delivery to her would have satisfied the obligation of the telegraph company to Mitchell.

The duty which the telegraph company owes to the addressee is personal, and cannot be discharged by making inquiry for the person to whose care the message may be sent, nor by applying to the place of business or residence of the addressee, but inquiry must be made for the person addressed, if the circumstances are such as to show that he may probably be found away from such place of business or residence. The place to which a message is sent is but a guide for the messenger, and does not determine the measure of his diligence. Whether the messenger who is charged with the delivery of a telegram and fails to present it at the residence or place of business of the addressee has used ordinary diligence such as the law requires is a question of fact for the jury; and it was error for the court in effect to charge the jury as a matter of law that it was a duty of the telegraph company to deliver the message to the plaintiff's wife.

Attorneys for appellee cite the case of *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, as supporting the charge of the court above referred to; and upon a careful investigation we have found *Western Union Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. R. 989, which we think is more nearly in point. The former case was based upon substantially the following facts: A message was sent to the plaintiff, and the telegraph company inquired at his place of business, ascertaining that he had left the

city, and having exhausted all means of delivering the message to him personally, delivered it to his wife and notified the sender of the fact of such delivery. The court held that the telegraph company had used due care and had discharged its duty to the plaintiff, but did not hold that it was the duty of the company to make the delivery to the wife.

In the case of the Western Union Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. R. 989, a message was sent to the plaintiff in the case at the town of his residence. He was a merchant, and his store was a short distance from the telegraph office, where his wife was in charge of the business, and he had a clerk employed also. His residence was also near by. The party addressed was out of the town, and the telegraph company failed to apply at his place of business or residence for information or for the purpose of delivering his message. The court held as follows: "Being unable to make a personal delivery at that place, it was the duty of the company to deliver it to his wife or to his clerk at the store or to members of his family at his residence. If delivery had been made at either of these places, the agents of Woods would have had time and opportunity to have sent a message to him at Grant Summit, and thus have averted the loss which followed." It will be observed that the court here speaks of the persons to whom the delivery should have been made as the agents of the party addressed, and in so far as they were agents and authorized to receive the message this is a correct expression of the law, but that portion which announces that it was the duty of the telegraph company to deliver to members of the family is purely dictum and without any support whatever.

176. CENTRAL UNION TELEPHONE CO. V. FALLEY,

118 Ind. 194; 20 N. E. R. 145; 10 Am. St. R. 114. 1888.

Mandamus, to compel appellant to furnish her a telephone at her place of business with telephonic connections and facilities. The Indiana statutes required every telephone company with wires wholly or partly in the state and doing a general telephone business to furnish telephone service and connections without discrimination to all applicants at a charge not in excess of \$3.00 per month. Defendant alleged that it had gone out of the general rental business, offering a public toll service instead.

OLDS, J. . . . In determining this case, it is important to consider the nature of the telephone, how operated, the utility of it, and

the rights of the parties in the absence of the statutes enacted by the legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists to send, receive, and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "an instrument for conveying sound to a great distance."

In the case of the Central Union Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. R. 721, the word "telephone," as used in the act of April 13, 1885, was held to mean "an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified

and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons, and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the case of *State v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. R. 404; *Vincent v. Chicago etc. R. R. Co.*, 49 Ill. 33; *People v. Manhattan Gas Light Co.*, 45 Barb. 136. And the principle held in these cases is in accordance with the well-settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities, and service; and even if it were controverted, it is well settled by authorities that the legislature has the right to do so, relative to the business conducted within the state: *Hockett v. State*, 105 Ind. 250, 5 N. E. R. 178, 55 Am. R. 201; *Central Union Telephone Co. v. Bradbury*, *supra*, and authorities cited in those cases; *Johnson v. State*, 113 Ind. 143, 15 N. E. R. 215; *Munn v. Illinois*, 94 U. S. 113; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 7 S. Ct. R. 907; *Patterson v. Kentucky*, 97 Id. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent

discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telegraph company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation, or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the legislature that where a telephone company was doing a general telephone business in this state, any person within the local limits of its business in a town or city should have the right to demand and receive a telephone and telephonic connections, facilities, and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the state. The legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual and gave him the right to demand and receive such service within the limits of the company's business, in any town or city where such company is doing a general telephone business.

It is insisted, as it appears by the answer that the lines of the appellant extended through the states of Ohio, Indiana, and Illinois, that appellant was engaged in interstate commerce; that it was a common carrier of news between the states, and that therefore such statutes are an interference with interstate commerce. We cannot agree with that theory. These statutes simply provide that telephone companies shall provide persons within this state with certain service, and for such service shall receive a certain compensation. They only seek to control the service within this state. If section 2 of the act of April 13th, providing for the price to be paid for connections between two cities or villages, should be construed to apply to two cities or villages one of which was without this state, then there would be some question as to the validity of that section, or the power of the legislature to control the price to be paid for a message or the use of the telephone for communicating with a person beyond the limits of the state; but that question is not involved in this case, as one section of a statute may be valid and another not. Telegraph companies stand upon a dif-

ferent footing, in some respects, from that of telephone companies; they have been granted some rights and privileges by acts of Congress which cannot be abridged or interfered with. In the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. R. 1126, referred to by counsel for appellant, it was held that the act was void in so far as it sought to govern the delivery of messages outside of the state: *State v. Newton*, 59 Ind. 173.

It is also contended by counsel for appellant that as the statute provides a remedy other than that by mandate for a violation of the statute, the writ of mandate is not a proper remedy.

The right to have the telephone and telephonic connections and facilities is a right given by the statutes. It is a legal right, which may be enforced by mandate. No remedy is adequate which does not give the person that to which he is entitled by law; the penalty of one hundred dollars is cumulative, and does not abridge or take away the right to a writ of mandate. The statute itself provides that the act shall not be so construed as to "abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise." The statutes should be so construed as that the penalty shall not take away any of the other remedies the aggrieved person may have, one of which remedies is by writ of mandate. This court held, in the case of *Central Union Tel. Co. v. Bradbury*, *supra*, that Bradbury was entitled to his remedy by writ of mandate compelling the company to furnish him with a telephone and telephonic service. The right to a writ of mandate requiring telephone companies to furnish telephonic service to persons entitled thereto has been held in *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. R. 583; also by the supreme court of Pennsylvania, in *Bell Telephone Co. v. Commonwealth*, Sup. Ct. Penn., Apr. 19, 1886, 59 Am. R. 172. In this case the complaint states a good cause of action under the statutes.

The second paragraph of the answer alleges the conducting of the defendant's business in the several states, and that it is engaged in interstate commerce, and that to furnish relatrix with an instrument and connection with its lines would put her in connection with its offices outside of the state, and furnish her facilities for transmitting messages from Lafayette to various places in Ohio and Illinois, where the appellant has its wires and offices. This paragraph does not controvert the facts alleged in the complaint, that appellant, at the time of the acts and things complained of, etc., was owning and operating a system of telephone lines and wires, and engaged in doing a general

telephone business in the city of Lafayette, and that the place of business of the relatrix is within the limits of the appellant's telephone business in said city; and it must also be remembered that the demand, as alleged in the complaint, was only that she be furnished with a telephone and telephonic connections and facilities necessary to place her, at her said store, in telephonic communication with patrons of appellant in said city. The statutes contemplate two kinds of service, and different compensations for each; one, connections and facilities for conversing with patrons of the company within any city or town where an exchange is maintained; the other, for conversing between two towns or cities.

The other paragraphs show the appellant to have been engaged in a general telephone business in said city, operating the same under a toll system at the time of the demand and tender by relatrix, and do not controvert the allegations in complaint that the plaintiff's place of business is within the local limits of appellant's business in said city. Neither of the paragraphs of answer is sufficient.

Under the construction we have given the statutes, there was no error committed by the court below in overruling the demurrer to the complaint, sustaining the demurrers to the answers, or in granting the writ of mandate.

The judgment is affirmed, with costs.

PART V

OF ACTIONS AGAINST CARRIERS

CHAPTER XVI.

THE ACTION AND THE DAMAGES.

177. FINN V. WESTERN RAILROAD CORPORATION,

112 Mass. 524; 17 Am. R. 128. 1873.

Action on contract for shipment of shingles. No consignee was named in the bill of lading, but evidence was introduced to show that one bunch in six or eight of the shingles was plainly marked "J. S. Clark, Southampton, Mass." Shipment was by Erie Canal to Greenbush, thence by defendants' railroad to destination. Defendants' agents at Greenbush wrote plaintiff that there was no consignee named in the bill of lading, and plaintiff mailed a letter giving direction. This the agent testified he did not receive. The shingles were burned in defendants' warehouse. Plaintiff had meantime drawn on Clark for the price and the draft had been paid. The jury found that defendants' agent did see the full address of the consignee on the bunches of shingles. Verdict for plaintiff. Exceptions by defendant.

WELLS, J. The only question argued by the defendant, upon these exceptions, is whether the action for loss of the property can be maintained by and in behalf of Finn. It is contended that if there was a delivery, with proper directions for the transportation, so as to charge the defendant with responsibility as carrier, then the title to the property had passed to Clark, the consignee; and the right of action for injury to it was in him alone. On the other hand, if proper directions for its transportation had not been given, then the defendant is not liable at all as carrier, according to the former decision in 102 Mass. 283. It is not contended that the defendant is liable as warehouseman. In either aspect of the case, upon this view of the law, no recovery could be had by Finn.

The jury having found that the defendant became responsible as carrier, the case is now presented only in that aspect. We think also that the facts, as disclosed by the present bill of exceptions, show that the title to the property had passed to Clark before the loss occurred; leaving in Finn at most only a right of stoppage *in transitu*.

The liabilities of a common carrier of goods are various; and, when not controlled by express contract, they spring from his legal obligations, according to the relations he may sustain to the parties, either as employers, or as owners of the property. *Prima facie*, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. His obligation to carry safely, and deliver to the consignees, subjects him to liabilities for any failure therein, which may be enforced by the consignees, or by the real owners of the property, by appropriate actions in their own names, independently of the original contract by which the service was undertaken. Such remedies are not exclusive of the right of the party sending the goods, to have his action upon the contract implied from the delivery and receipt of them for carriage. This, in effect, we understand to be the result of the elaborate discussion of the principles applicable to the case in *Blanchard v. Page*, 8 Gray, 281. That decision may not be precisely in point, as an adjudication, to govern the case now before us; for the reason that there was a written receipt or bill of lading for carriage by water, and the plaintiffs were acting in the transaction as agents for the owners of the goods; yet the general principles evolved do apply, and are satisfactory to us for the determination of the present case.

When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily be, in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods; or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction, we think, must determine whether the right of action upon the contract of service, implied from the delivery and receipt of goods for carriage, is in the consignor

or in the consignee. In the case of *Blanchard v. Page* the action was maintained in the name of the consignors, who were merely the agents of the owners in forwarding the goods. But that was explicitly on the ground of the express contract with them, embodied in the receipt or bill of lading.

As already suggested, the consignee, by virtue of his right of possession, or the purchaser, by virtue of his right of property, may have an action against the carrier for the loss, injury or detention of the goods, though not party to the original contract. Such action is in tort for the injury resulting from a breach of duty imposed by law upon the carrier; or, in the language of the early cases, upon "the custom of the realm."

There are many cases, both in England and in the United States, in which the doctrine appears to be maintained that, except when there is a special contract, a remedy for injury resulting from breach of duty by a carrier, can be had only in the name and behalf of some one having an interest in the property at the time of the breach, which is injuriously affected thereby.

The rule might well be conceded, if the exception were not too restricted. It will hold good in actions of tort, because they are founded upon injury to some interest or right of the plaintiff. And the cases which support this view are mostly, if not altogether, actions of tort. This is true of the leading early case from which the doctrine is mainly derived: *Dawes v. Peck*, 8 T. R. 330; also of *Griffith v. Ingledew*, 6 S. & R. (Pa.) 429, 9 Am. D. 444; *Green v. Clark*, 5 Denio, 497, 13 Barb. 57, and 2 Kernan, 343; and does not appear from the report to be otherwise in *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. R. 402. In discussing the grounds of decision it seems to have been assumed by various judges, as we think erroneously, that the right of recovery necessarily involved the question with whom the original contract of service was made. And the effort to make the inference of law as to that contract conform to what was deemed the proper decision as to the right to recover for the injury, has led to some statements of legal inference which appear to us to be somewhat overstrained. Thus in *Dawes v. Peck*, it is said by LAWRENCE, J., that, in the payment of freight by the consignor, he is to be regarded as the agent of the consignee; that the carrier generally knows nothing of the consignor, but looks to the person to whom the goods are directed. In *Freeman v. Birch*, 1 Nev. & Man. 420, it is said by PARKE, J., "In ordinary cases the vendor employs the carrier as the agent of the vendee." In *Green v. Clark*, 13 Barb. 57, it is said by ALLEN, J., that when the consignee is the legal owner, or the property vests in him by the delivery to the carrier, "it is an inference of law, and not

a presumption of fact, that the contract for the safe carriage is between the carrier and consignee, and consequently the latter has the legal right of action." But in the same case in the Court of Appeals, 2 Kernan, 343, it was regarded as immaterial by whom the contract was made, and whether the plaintiff was consignor or consignee, for the purposes of an action of case for negligence by which his property was injured.

In Griffith v. Ingledew, the dissenting opinion of GIBSON, J., assuming that the contract of carriage formed the basis of the action, combats with great force of reasoning the proposition that a contract with the consignee is the legal result of the receipt of goods by a carrier, when no privity with, or authority from, the consignee is shown, and none professed by the consignor at the time, unless the direction of the goods to the address of the consignee can be taken to be such profession.

The whole force and effect of the reasoning in Blanchard v. Page is in the same direction. The ordinary bill of lading or receipt, given to the consignor by the carrier, simply expresses what is the real significance of the transaction independent of the writing. There is no reason for giving a different interpretation to, or drawing a different inference from, the acts of parties, because of a writing which is nothing but a voucher taken to preserve the evidence of those acts.

Whatever remedy is sought in contract must necessarily be sought in the name of the party with whom the contract is entered into, whether it be special, that is, express or implied. The question then is simply this: In the absence of an express agreement, with whom is the carrier's contract of employment and service in respect of goods delivered to him by the seller to convey to the purchaser, when there is no privity or relation of agency between the carrier and the purchaser save that which springs from possession of the goods, and the seller has no authority to make a contract for the purchaser except what is to be implied from the agreement of purchase or the order for the goods?

The law imposes upon the carrier the duty to transport the goods, allows him a reasonable compensation, and gives him a lien upon the goods for security of its payment. It also implies a promise on the one part to carry and deliver the goods safely, and on the other, to pay the reasonable compensation. These two promises form the contract. Each is the counterpart and the consideration of the other. If the contract of carriage is with the consignee, the reciprocal promise to pay the freight must be his also. Against this inference are the considerations that the seller is acting in his own behalf in making the delivery,

and the goods remain his property until the contract with the carrier takes effect. The title of the purchaser does not exist until that contract is made. It follows as a result. The carrier is not agent for either party, but an intermediate, independent principal. If made an agent of the consignee, his receipt of the goods cuts off the right of stoppage *in transitu* on the one hand, and satisfies the statute of frauds on the other. He has a right to look for his compensation to the party who employs him, unless satisfied from his lien. The fact that, as between seller and purchaser, the purchaser must ordinarily pay the expenses of transportation as a part of the cost of the goods, does not affect the relations of contract between the carrier and either party. We discover nothing in the nature of the transaction, and we doubt if there is any thing in the practice or understanding of the community, which will justify the inference that one to whom goods are sent by carrier, without direction or authority from him, other than an agreement of purchase or consignment, is the party who employed the carrier and is bound to pay him; unless he assumes such liability by receiving the goods subject to the charge.

The contract is made when the goods are received by the carrier. If it is then the contract of the consignee, it will not cease to be so, and become the contract of the consignor, by reason of subsequent events. Suppose, then, the seller exercises his right of stoppage *in transitu*. Is the purchaser still liable to the carrier for the unpaid freight? Suppose the contract of sale to be without writing and within the statute of frauds. The contract of the carrier is not within the statute, and the authority to the seller to make such contract in behalf of the purchaser need not be in writing. Is the carrier to look to the purchaser or to the seller for the freight? Or does it depend upon the contingency whether the contract of sale is affirmed or avoided? And if affirmed, and the carrier should deliver the goods without insisting on his lien, of whom must he collect it? The authorities hold, when the agreement of sale is within the statute of frauds, that the contract of the carrier is with the consignor. *Coombs v. Bristol & Exeter Railway Co.*, 3 H. & N. 510; *Coats v. Chaplin*, 3 Q. B. 483.

We do not think the carrier's contract and right to recover his freight can be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation. His contract must arise from the circumstances of his employment. He has a right to look for his compensation to the party who required him to perform the service by causing the

§§ 177, 178 ACTIONS AGAINST CARRIERS OF GOODS.

goods to be delivered to him for transportation. And that party, unless he is the mere agent of some other, may enforce the contract, and sue for its breach by the carrier.

One who forwards goods, in execution of an order or agreement, for sale is not a mere agent of the purchaser in so doing. He is acting in his own interest and behalf, and his dealings with the carrier are in his own right and upon his own responsibility, unless he has some special authority or direction from the purchaser, upon which he acts.

The plaintiff in this case is, therefore, entitled to maintain his action upon the contract; and we think there is no sufficient reason shown to prevent his recovering the full value of the property destroyed. If Clark was the owner at the time, and his interest has been in no way satisfied or discharged, the plaintiff will hold the proceeds recovered in trust for his indemnity. Clark might have prosecuted an action of tort in his own name; and recovered the value of his property lost; in which event the damages in Finn's suit would have been nominal, or reduced to whatever amount of actual loss he suffered. But it is not pretended that Clark has ever brought any suit or made any claim upon the defendant, although knowing of the pendency of this suit, and having testified as a witness in the same; and all claim by him is long since barred. It is to be presumed that he acquiesces in the recovery by Finn. If there were any doubt upon this point, we might order a new trial upon the question of damages only. As there is none, the judgment must be upon the verdict.

Exceptions overruled.

**178. SAVANNAH, FLORIDA AND WESTERN RAILWAY
CO. V. PRITCHARD, MATTHEWS AND CO.,**

77 Ga. 412; 1 S. E. R. 261; 4 Am. St. R. 92. 1887.

Action for damages due to delay by defendant railway in carrying. Judgment for plaintiffs.

HALL, J. The plaintiffs, who were engaged in gathering crude turpentine and manufacturing it into spirit and rosin, brought suit against the Savannah, Florida and Western Railway Company for failing to deliver to them the worm of a turpentine-still which they had shipped by their road from Savannah to Lumber City, on the East Tennessee, Virginia, and Georgia Railroad. It seems from the evidence that the worm was carried

to Cochran, on the latter railroad, where it was delivered in the depot, and from there it was carried to the distillery of another party, some eight miles into the country. After various efforts to trace the missing worm, and considerable expense incurred to find it, it was at length reclaimed by its owners from the party to whom it had been delivered, six weeks having elapsed between the time it should have been received at Lumber City and when it was actually received and put to use by the plaintiffs. During all that time their machinery, and hands employed in running it, were idle, and the tree-boxes, from which the crude gum was gathered, had run over, and much of it was wasted for the want of barrels in which to deposit it; and such loss would not have occurred had the worm come to hand at the proper time, and the plaintiffs been enabled to use their still. The principal loss was in the crude turpentine, estimated at eighty-six barrels, the value of which was four dollars a barrel. Plaintiffs had a verdict for \$564.70, which was the amount of the entire damages proved, less \$16. Defendant made a motion for new trial, which was overruled, and the defendant excepted.

(After stating the defendants' exceptions to the verdict and the charges of the court below.)

There are two questions, and only two, made by this record:—

1. The first is as to the liability of the defendant for the delay in delivering the still-worm, which occurred on the connecting road at the point to which it was consigned, and to which the defendant had contracted to carry and deliver it. Of its legal liability for this default, we think, under the decisions of this court, there can be no doubt: See *Central R. R. v. Dwight Mfg. Co.*, 75 Ga. 609; *Falvey v. Georgia R. R.*, 76 Id. 597.

2. The material question in the case, however, is, whether the court gave the jury the correct rule as to the measure of damages, especially in the charge as to the item of loss of the crude turpentine. That loss, as we think, was the natural and legal result of the defendant's negligence. The claim on that account did not rest upon expected profits, but the loss of the material from the manufacture of which it was expected profits would be derived. These questions were fairly submitted to the jury, and there was evidence under the repeated ruling of this court and other courts which justified their finding in this respect: *Hadley v. Baxendale*, 9 Ex. 341; 1 *Sutherland on Damages*, 71, 77, 93, on the last of which pages it is said that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: that the damages must be such as

§§ 178, 179 ACTIONS AGAINST CARRIERS OF GOODS.

may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed: *Georgia R. R. v. Hayden*, 71 Ga. 518, 51 Am. R. 274; Code, secs. 2944, 3072-3074, cited and commented on in that case; *Willingham v. Hooven, Owens, Rentschler, & Co.*, 74 Ga. 233, 58 Am. R. 435; *Stewart v. Lanier House Co.*, 75 Id. 582.

There is very little doubt that the plaintiffs were entitled to recover the necessary expenses incurred in finding the still-worm, and taking possession of the same. The result of that search mitigated the damages that would have formed a proper claim against the defendant. It should not complain of acts which inured to its benefit. We cannot conclude from anything that appears in this record that the finding in favor of the plaintiff is excessive, or in this respect contrary to the amount of actual damages proved to have been sustained by the plaintiffs. It was the province of the court to interpret and construe the contract of affreightment made between the plaintiffs and defendant, and we agree with the judge in his interpretation of this contract; in fact, we think the charges excepted to eminently correct and clearly and happily expressed.

Judgment affirmed.

179. COOPER V. YOUNG,

22 Ga. 269; 68 Am. D. 502. 1857.

Case. Judgment for plaintiff.

By Court, McDONALD, J. This suit is instituted against the defendant, as a common carrier, for the non-delivery of stone-coal which he had undertaken to carry for the plaintiff from Chattanooga in Tennessee to Etowah in Cass county, Georgia. The plaintiff is engaged extensively in the manufacture of iron, and relies for his supply of coal to carry on his operations on that which is carried by railroad from Chattanooga to the neighborhood of his works. The coal belonged to plaintiff; the defendant was to transport it. It is alleged that by reason of the failure of defendant to carry the coal according to contract the plaintiff was obliged to suspend his work, and that by reason of that suspension he failed to make a certain amount of *per diem* profit, and this loss of profit he insists is the measure of his damages. He offered proof of these profits, which was ob-

jected to by the defendant's counsel, and the decision of the court sustaining the objection is the only error complained of in the record. The soundness of the decision in law depends on the rule by which damages are to be assessed against common carriers for non-delivery of articles committed to them at the time and place stipulated for their delivery. The general rule is, that if a common carrier fail to deliver goods according to contract he is liable for the value of the goods at the time and place at which he engaged to deliver them. The rule is an easy and simple one. It is just to the owner, and does no injustice to the carrier: Sedgwick on Damages, 355; Angell on Carriers, 460; Edwards on Bailm. 570. In such cases the carrier deducts from the value at the place of destination the freight for transporting them, and pays the balance. The owner gets his profit, and the carrier gets his freight; but if there be no trade in the article transported at the place of destination, and nothing of the kind can be purchased there, and the owner wishes it for consumption in carrying on his business, and cannot proceed without it, what is the rule? We know of no rule making the carrier liable for the loss of profits in the sale of articles to be manufactured of materials delivered to him for transportation, if he should fail to deliver them.

When he undertakes as a common carrier, he undertakes in view of the liability which the law annexes to the character of common carriers for a breach of their contracts; and the owner, when he commits his goods to him, does it likewise with a view to the redress which the law entitles him to against the carrier, if he make default. But because there is no trade in the article delivered to be carried at the place of destination, it is no reason that the carrier should not be liable for the breach of his contract. The plaintiff is injured, and seriously injured, by his default. In the case before us, the plaintiff is engaged at heavy expense in the manufacture of iron, and coal is essential to the carrying on of his business. His works are constructed for the use of coal, and a failure in a regular supply subjects him to serious losses. If there be no market at the place at which the coal was to be delivered to the plaintiff from which he might supply himself, he must resort to some other mode of transportation, however expensive, or stop his works. In the case of *O'Connor v. Forster*, 10 Watts, 418, cited in Sedgwick on Damages, 357, the defendant was sued for damages for refusing to transport wheat from Pittsburg to Philadelphia according to contract. The transportation was prevented by the approaching freezing of the canal. The defendant contended that the measure of damages was the price agreed on for the freight and

that for which the carriage by others might have been obtained; and the court held that this would be the rule if the plaintiff could have obtained another conveyance. There being a market for wheat at Pittsburgh as well as Philadelphia, the court held the rule of damages to be the difference between the value of wheat at Pittsburgh, with the freight added, and its value at Philadelphia.

In estimating the damages in cases when the article to be transported cannot be purchased at the place of destination, and the carrier who has contracted to carry it has the exclusive right of transportation by the cheapest mode, the difference between the price agreed upon or usual by that mode and the terms on which others would carry it by other modes of transportation ought to be considered; and in this case, and all like it, it might not be improper to admit, additionally, evidence of losses by the expense of hands, etc., during a necessary suspension of business occasioned by the default of the carrier for a period during which the plaintiff, by ordinary diligence, could not supply himself by other means with the article agreed to be carried.

It is proper for me to remark that the rule as to the measure of damages in this case was not very fully discussed by us, as it was not necessary for the decision of the question presented in the record to go beyond the particular measure of damages insisted on by the plaintiff.

We know of no rule which subjects a common carrier to a higher measure of damages for a breach of his contract than the amount of profits which the owner might have made, over the freight and cost, by a sale at the time and place at which the article or goods to be transported were to be delivered, provided there be a market for the article there. In case there be no market for the commodity or goods, and the owner requires them for his own use, I do not see why the rule should not be modified to suit the justice of the case; but it cannot, in our judgment, be so modified as to hold that the carrier shall be liable for the profits which the owner might have realized by the sale of articles into which he might manufacture them. Such a rule would make the carrier an insurer against all casualties in the process of manufacturing.

Several cases have been relied on to establish the proposition contended for, but none of them, in our judgment, sustains it. The case of *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Sedgwick on Damages*, 74, was not the case of a carrier, but it was the ordinary case of an agreement to purchase, at stipulated prices, marble, to be delivered as agreed upon in the contract. The seller of the marble had to purchase

it. The agreement had all the essential parts of a contract. One party had no right to disaffirm and annul it without the consent of the other.

If the plaintiff in that action had been a defendant, and the suit had been for a failure to deliver the marble agreeably to his contract of sale, he could not have discharged himself from liability by alleging that he could not himself purchase the marble at any price, but he would have been held to the contract, and the damages to which he would have been subjected would have been the difference between the price at which he had contracted to sell it and the price that the plaintiff had or would have had to pay for it, however enormous, if it was a price, and no greater, at which the same quality of marble could be obtained by the use of due prudence and diligence. If one of the elements of a contract be mutuality of obligation, the other party was certainly liable for a breach, from whatever cause, except the fault of the plaintiff, and he could not excuse himself by his abandoning or suspending the work on which he intended to use the marble.

But the action in this case was not instituted for a breach of the sale of coal at a stipulated price to be delivered at that place. Had it been, the measure of damages would have been the difference between the market price at that place and the stipulated price, without reference to its value elsewhere.

The rule which I have suggested as the proper one for the measures of damages against a carrier who has the exclusive right of transportation by the cheapest mode, at the suit of a person engaged extensively in manufacturing, and who, from the breach of the contract for carrying the article necessary to him in his business by the carrier, has been compelled to suspend his operations, seems to meet the justice of the case more nearly than any that occurs to my mind.

Judgment affirmed.

180. GREEN V. BOSTON AND LOWELL RAILROAD CO.,

128 Mass. 221; 35 Am. R. 370. 1880.

Action against a carrier for the value of an oil painting of plaintiff's father. Judgment for plaintiff.

MORTON, J. (Omitting other matters.) The contract between the parties contains the following provision: "No responsibility will be admitted, under any circumstances, to a greater amount upon any single article of freight than \$200, unless

upon notice of such amount and a special agreement therefor. Specie, drafts, bank-bills and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent." The defendant asked the judge to rule, that as the plaintiff had not given notice of the value of the lost case, and had made no special agreement as to its transportation, assented to by the superintendent, he could not recover.

The plaintiff admitted that the first clause of this provision applied to this case, and claimed and recovered only a verdict for \$200. The other clause does not specify portraits as articles which will be taken only upon a representation of their value and a special agreement. It specifies "specie, drafts, and bank-bills." In determining the meaning of the words "other articles of great intrinsic or representative value," the rule *noscitur a sociis* applies; the general words following the particular enumeration must be held to include only articles of the like kind.

A portrait is not an article of great intrinsic or representative value, like specie or drafts or bank-bills, and therefore the Superior Court rightly refused to rule as requested in the first and second prayers of the defendant.

The defendant asked the court to rule that "the plaintiff can recover only a fair market value of the article lost." The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affects its value to the owner. *Stickney v. Allen*, 10 Gray, 352. The court properly refused to give the instruction requested, and we are to presume gave proper instructions instead thereof. This being the rule of damages, the testimony of the plaintiff that he had no other portrait of his father would bear upon the question of its actual value to him and was competent.

(Omitting other matters.)

Exceptions overruled.

181. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO. V. GOODYKOONTZ,

119 Ind. 111; 21 N. E. R. 472; 12 Am. St. R. 371. 1889.

Action by guardian to recover damages for negligence causing death of ward.

MITCHELL, J. Goodykoontz, as guardian, complains of the appellant railroad company, and charges that the death of his ward, George Lowery, a minor under the age of twenty-one years, was instantaneously caused by the negligence and wrongful conduct of the company. The only averment upon the subject of damages is, that the ward left surviving him "a mother and sister and next of kin competent to share in the distribution of the personal estate of said deceased, to whom damages inure," and that by reason of the injury and death the ward's estate has been damaged in the sum of ten thousand dollars.

There was a special verdict, and a judgment for two thousand five hundred dollars.

It is conceded that the action was brought under section 266, Revised Statutes of 1881, which reads as follows: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

It was a settled rule of the common law that that no one could maintain a civil action for damages on account of the death of a human being. All claims for injuries to the person were extinguished by the death of the person injured. *Actio personalis moritur cum persona*. If a child was wrongfully injured, the father, or person lawfully entitled to the child's services, might recover for the loss of services during the period of disability up to the time of death, if death resulted. Incidental damages for nursing, surgical and medical attendance, including appropriate funeral expenses in case of death, were also recoverable by a parent.

The statute above set out has added to the common-law remedy of a parent the right to recover all the probable pecuniary loss resulting from the death of a child. The right of action is primarily in the father, but contingently in the mother; and whether there be a guardian or not, the father, or under certain contingencies the mother, may maintain an action under

the above section. In estimating the damages, the value of the child's services from the date of the injury until he would have attained his majority, including the cost of nursing, medical and surgical attendance, occasioned by the injury, together with necessary funeral expenses if death resulted, are to be considered: *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. R. 793; *Rains v. St. Louis etc. R'y Co.*, 71 Mo. 164, 36 Am. R. 459; *McGovern v. New York etc. R. R. Co.*, 67 N. Y. 417; 2 *Thompson on Negligence*, 1292; 2 *Wait's Actions and Defenses*, 477; *Shearman and Redfield on Negligence*, 3d ed., sec. 608.

The foregoing are the elements which enter into and presumably comprise the sum of the pecuniary loss sustained by a parent in case of the injury or death of his child; and whether the child was under guardianship or not, the right of action to recover this pecuniary loss is in the parent to whom the child owed service, and from whom he was entitled to receive support. While either the father or mother is alive, unless they have relinquished their right, respectively, to the services of the child, by emancipation or otherwise, and have abdicated their duty to furnish him support, no one else is entitled to maintain an action for the loss of his services during minority, because the injury is to the person entitled to the child's services and not to the minor's estate: *Walters v. Chicago etc. R. R. Co.*, 36 Iowa, 458; *Cooley on Torts*, 314 et seq.

If a minor under guardianship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of the ward, precisely as the latter might have recovered through the intervention of a *prochein ami*, in case he had not been under guardianship. This is so, whether the ward's father or mother be living or not. The pain and suffering endured and the permanent injury resulting from the wounding or maiming of a minor are personal to himself, and damages for such pain and injuries are always recoverable for his benefit. We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent's estate. Doubtless, a guardian who has been required to make expenditures for care and medical attendance, or for funeral expenses, out of his ward's personal property, may maintain an action against a wrong-doer to reimburse the estate; but surely he cannot recover general damages for the death of the ward

for the benefit of his estate, no matter who inherit as his heirs. Damages cannot be recovered for the death of a human being, except by or for the benefit of those who are supposed to have sustained a sensible and appreciable pecuniary loss therefrom. Pecuniary loss, not to the estate of the deceased person, but to those who had a reasonable expectation of pecuniary benefit, as of right, or of duty, or from a recognized sense of obligation, from the continuance of life, is the foundation of the action: *Franklin v. South Eastern R'y Co.*, 3 Hurl. & N. 211; *Dalton v. South Eastern R'y Co.*, 4 Com. B., N. S., 296; *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499; *Mayhew v. Burns*, *supra*; *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15. It is the injury to the survivors entitled to sue, and not the value of the life lost, that forms the basis of damages: *Pennsylvania R. R. Co. v. Zebe*, 33 Id. 318.

Under section 266, only persons having a reasonable expectation of pecuniary benefit, as of right, duty, or obligation, in some sense, from the continuance of the life, are entitled to maintain the action, unless possibly under exceptional circumstances clearly showing appreciable pecuniary loss. Section 284, which gives a right of action to the personal representatives for the exclusive benefit of the widow and children, or next of kin, is entirely disconnected from section 266, and exerts no sort of influence upon the construction of or rights conferred under the latter section: *Mayhew v. Burns*, *supra*. The two are not to be confused or confounded with each other, but each is to be construed independently of the other.

Where the death of a minor has been wrongfully caused, the parent may maintain an action to recover the probable pecuniary loss sustained. The guardian, if there be one, may, no action having been brought by the parent, maintain an action to reimburse the personal estate of the ward for any actual loss: Section 266. If the death of any one is caused in like manner, an action may be maintained by his personal representatives, provided the person whose death has been caused left a wife or children, or next of kin, who had any appreciable pecuniary interest in the continuance of his life: Section 284; *Mayhew v. Burns*, *supra*, and cases cited.

It appears, from the complaint in the present case, that the ward whose death gave rise to the action was a minor, and that his mother was alive at the time the suit was commenced. Presumably she was, and is yet, unless barred by lapse of time, entitled to maintain an action to recover for the loss of her son's services. Death was instantaneous, and it does not appear that the guardian paid anything out of the ward's personal estate

§§ 181, 182 ACTIONS AGAINST PASSENGER CARRIERS.

for funeral expenses. Hence the complaint shows no right of action in the guardian.

The judgment is therefore reversed, with costs.

182. CARSTEN V. NORTHERN PACIFIC RAILROAD CO.,

44 Minn. 454; 47 N. W. R. 49; 20 Am. St. R. 589. 1890.

Damages for wrongful ejection from a train. Plaintiff purchased of a ticket broker the return portion of a limited round-trip ticket. An agent styled a "ticket-exchanger," acting as assistant to the conductor, notified plaintiff that his ticket was not good because purchased at a scalper's office, and took up and retained the ticket. The regular conductor later affirmed this and told plaintiff he must leave the train unless he paid his fare. As the train approached a station he returned with two brakemen to eject plaintiff, put his hand on plaintiff's shoulder and without violence or abuse led him to the door. A stranger, however, paid his fare to Brainerd, where plaintiff voluntarily left the train.

VANDERBURGH, J. . . . 1. The evidence is sufficient to show that the ticket was genuine and was good for one passage from Minneapolis to Detroit as a return ticket, and that it was wrongfully taken away from plaintiff, and appropriated by the agent of the defendant. The ticket was transferable in the absence of any restrictions in the original contract of sale, and was valid in plaintiff's hands. The conductor was fully advised of the facts in the case, which he could verify by reference to his assistant on the same train. His conduct in requiring the plaintiff to leave the train was therefore wrongful: *Burnham v. Grand Trunk R'y Co.*, 63 Me. 298, 18 Am. Rep. 220.

2. It is an action sounding in tort, and we think the plaintiff entitled to claim damages for the wrong and injury done him, in addition to the price of the ticket, though no particular loss or special injury to his person was shown. The evidence tended to prove that the agents of the defendant laid hands on him, and were proceeding to eject him by force, if necessary, from the car, which was full of passengers. The fact that he escaped personal violence by non-resistance does not deprive him of his right of action; and the jury were entitled to consider, in connection with the physical acts of the conductor in wrongfully attempting to eject him, the annoyance, vexation, and mortification suffered by him, and the indignity put upon him: *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; 3 Suther-

land on Damages, 712, 715; 2 Beach on Railway Law, sec. 891. But the jury must be governed by the evidence, and the damages assessed must be appropriate to the nature of the case, which will be modified by the circumstances, such as the presence or absence of personal malice, actual violence, and threatening or insulting language: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, 573. The instruction given by the court to the jury, that if the conductor took up the ticket, and failed to give any excuse for his refusal to return the same to plaintiff, and no excuse existed, they might presume that he acted malevolently, and with a tyrannical and oppressive motive, and might award him "any amount of damages that is proper, not exceeding the sum of one thousand dollars," was, we think, in view of the evidence in the case, erroneous, and likely to mislead the jury as to the extent of their discretion on the question of damages.

3. The plaintiff was permitted, against the objection of the defendant, to prove that, by reason of his delay at Brainerd, he lost a job of thrashing at Detroit, for which he expected \$2.25 per day. He testified that he was detained there for a week for want of money to go any farther, and this alleged loss the jury were allowed to consider. This was error. Such damages are too remote. They cannot be considered the proximate result of the alleged wrongful act of the conductor. There must have been several other independent causes to which the same result might have been referred: *Brown v. Cummings*, 7 Allen, 507.

Order reversed.

183. SPADE V. LYNN AND BOSTON RAILROAD CO.,

168 Mass. 285; 47 N. E. R. 88; 60 Am. St. R. 393. 1897.

Tort for injuries to a passenger due to fright caused by the ejection from the car of a drunken passenger. No other injury was suffered. Judgment for plaintiff.

ALLEN, J. This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury;

but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston etc. R. R. Co.*, 163 Mass. 484, 40 N. E. R. 895, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or nonliability of a defendant guilty of negligence in a case like the present demands. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and, if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must, therefore, be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 Hurl. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the

acts done is of wide application, and has often been expressed and applied: *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. R. 1125, 31 Am. St. R. 528; *White v. Dresser*, 135 Mass. 150, 46 Am. R. 454; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 475; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. R. 308; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. R. 607; *Hampton v. Jones*, 58 Iowa 317, 12 N. W. R. 276; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. R. 435, 1 Am. St. R. 654; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, L. R. 9 P. D. 105; *Hobbs v. London etc. Ry.*, L. R. 10 Q. B. 111, 122.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. R. 354, 56 Am. St. R. 604; *Ewing v. Pittsburg etc. Ry. Co.*, 147 Pa. St. 40, 23 Atl. R. 340, 30 Am. St. R. 709; *Haile v. Texas etc. Ry. Co.*, 60 Fed. Rep. 557.

In the following cases, a different view was taken: *Bell v. Great Northern Ry. Co.*, 26 L. R. Ir. 428; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. R. 1034; *Fitzpatrick v. Great Western Ry. Co.*, 12 U. C. Q. B. 645. See, also, *Beven on Negligence*, 77, *et seq.*

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have

been in the actor's mind: *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. R. 1125, 31 Am. St. R. 528; *Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. D. 759.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be, exceptions sustained.

184. FERGUSON V. ANGLO-AMERICAN TELEGRAPH CO.,

178 Pa. St. 377; 35 Atl. R. 979; 56 Am. St. R. 770. 1896.

Action to recover damages for delay in delivering a cipher telegraph message.

McCOLLUM, J. This was an action for damages caused by the failure of the defendant to deliver promptly a telegraph message written in cipher. The evidence was to the following effect: Plaintiffs, on March 15, 1890, sent two cable messages in cipher, addressed to "Octorara," "Liverpool," the first of which ordered the purchase of fifty tons of soda ash, and the second ordered one hundred tons of the same, subject to shipment on the steamer *Kingsdale*. The first message was duly delivered to plaintiffs' agents, the second was not delivered until six days afterward. The steamer *Kingsdale* had sailed in the mean time. The delayed message reads as follows: "Bewail boarish, bewail bluster, provided steamer *Kingsdale*," and was interpreted to mean "purchase for our account 50 tons jarrow 55-56 per cent soda ash, 50 tons jarrow 48 per cent soda ash, provided shipment can be made per steamship *Kingsdale*." The plaintiffs had contracted for a resale of the entire one hundred and fifty tons, and, when the one hundred tons failed to arrive, they were compelled to pay a higher price to fill their contract, and thereby lost eight hundred and ninety-two dollars and seventy-two cents. The plaintiffs claimed that this was the measure of damages, but the court confined it to the sum paid for transmission of the message. Was this ruling erroneous? It seems that the question now presented has not been decided by this court. It has been frequently considered in many of the courts of our sister states and in England, and the great preponderance of authority is in accord with the ruling of the court below. The rule on this subject is stated in 25 *American and English Encyclopedia of Law*, 842, 843, as follows: "The rule already set out as to the measure of damages confines the plaintiff's recovery, in actions

against the company for negligence, to such as may fairly be supposed to have been in contemplation of the parties at the time of making the contract. This being true, it follows as a logical and necessary sequence that where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company had no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages or at most the price paid for transmission. And this is the rule which has been adopted by the English and American courts almost without exception." Many decisions of the courts of this country and England are cited as sustaining the rule above stated. The numerous decisions of the courts of many states will be found to be opposed to the decisions of the courts of only three states, those of Virginia, Georgia, and Alabama. Florida has recently reversed an earlier case, and thus joined the majority of the states on this question. The reasons advanced in support of the decisions which support the ruling of the court below have been various, the one most commonly applied being the rule of *Hadley v. Baxendale*, 9 Ex. 341. It is earnestly contended by the appellants that the rule of *Hadley v. Baxendale*, 9 Ex. 341, has no application to the case in hand, that the word "contemplate" is there used as contradistinguishing what is proximate and direct from what is remote and speculative, as in *Pennypacker v. Jones*, 106 Pa. St. 237, and *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382. They also call our attention to the fact that the view of *Hadley v. Baxendale*, 9 Ex. 341, contended for by the defendant, has been unsuccessfully urged upon this court at least twice before, namely, in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, and *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, and that therefore this question is not an open one.

We do not concede that the rule of *Hadley v. Baxendale*, 9 Ex. 341, has no application to this case, nor that the decision of this court in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, or in *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, is opposed to the ruling of the court below. The message in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, disclosed to the agent of the company the nature of the business to which it related, and there was uncontradicted evidence that the sender "notified the operator that he would look to the company for damages if they failed in transmitting the message." In *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, there was enough on the face of the message "to indicate to the operator that it referred to sheep, to be shipped to Philadelphia

and their price.” It was a case, not of delay, but of error in transmission, and PAXSON, J., speaking for this court said: “It seems reasonable that where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company on its guard. A delay of a day, or even a few hours, might cause a heavy loss.” This suggestion is applicable to the case now before us and in harmony with the view taken in *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554, in which the court said: “Aside from the reasons which support the rule of damages in *Hadley v. Baxendale*, 9 Ex. 341, there is here a question of public policy to which we could not shut our eyes if we were in doubt upon the question. Upon any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it or a total failure to deliver it, the door is open to unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They may construct any meaning they choose, and, upon the meaning thus constructed, they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit.” That the measure of damages contended for by the appellants might produce such results is obvious. Under it a telegraph company may receive for transmission a cipher message which on its face is absolutely unintelligible to them, and was intended by the sender to be so, and for the slightest delay in transmitting it they may be charged with damages which cannot reasonably be supposed to have been in the contemplation of both parties when they received it. Surely such a message furnishes no tangible ground for an inference that it relates to an important business transaction, or that the slightest delay in the delivery of it might subject the company to liability for such damages as are claimed in this case. In *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452, DIXON, C. J., said: “It cannot be said or assumed that any amount of damages or pecuniary loss or injury will naturally ensue or be suffered according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other com-

§§ 184, 185 ACTIONS AGAINST TELEGRAPH COMPANIES.

munication of trifling or unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation at the time of making the contract that any particular damage or injury would be the probable result of a breach of the contract on his part." To subject the company to the same liability for mistake or delay in the transmission of such a message that it might be subject to for a like mistake or delay in the transmission of an intelligible message would open the door to the perpetration of fraud, and disregard the well-settled rule of *Hadley v. Baxendale*, 9 Ex. 341. We find nothing in *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382, or in *Pennypacker v. Jones*, 106 Pa. St. 237, which can be considered as a repudiation or qualification of that rule, or in the way of its application to the case at bar. For the reasons above stated, we concur in the ruling of the court below.

Judgment affirmed.

185. MENTZER V. WESTERN UNION TELEGRAPH CO.,

93 Ia. 752; 62 N. W. R. 1; 57 Am. St. R. 294. 1895.

Action for damages caused by delay in delivering a telegram. Judgment for plaintiff.

DEEMER, J. There was testimony tending to show, and the jury may well have found that on the eleventh day of April, 1892, one H. Dorn delivered to defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message:

"Creston, Ohio, 11, 1892.

To J. D. Mentzer, Cedar Rapids, Iowa:

Mother dead. Funeral Wednesday. Answer if coming or not.
H. DORN."

That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employee in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 A. M., April 11, 1892, but through the negligence and carelessness of defendant's employees, was not delivered until 9 P. M., April 13th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was

buried on the 13th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. There was also testimony tending to show that plaintiff lost some time from his work, in trying to discover whether a message had been sent him or not. The court gave the jury the following instructions with reference to the measure of damages, in the event they found plaintiff entitled to recover: "7. If you find for plaintiff, then you will allow him for the amounts he paid for messages sent by him, if any; for loss of time caused by the failure to deliver said message, and rendered useless thereby, if any; and, in addition thereto, such an amount as you may find from the evidence to be just and reasonable to compensate plaintiff for the damages sustained by reason of mental anguish suffered by him by reason of failure to deliver said message, if any. But you should not allow plaintiff anything for loss of time or expense in going to Creston, Ohio, nor should you allow plaintiff for the money paid by Dorn for the message in question."

It is first insisted by appellant's counsel that the plaintiff cannot recover because he made no contract with the defendant, and is not in privity with it; that the action is founded on contract, and therefore he cannot maintain the suit. Such, no doubt, is the rule in England. But the courts of this country almost universally hold to the contrary. In the recent case of *Herron v. Telegraph Co.*, 90 Iowa, 129, we had occasion to consider this question; and the holding there, which is in accord with the current of judicial opinion in this country, was that the person to whom the message was addressed might maintain an action for the damages sustained by him.

2. It is conceded by appellant's counsel that plaintiff suffered damages under the first two heads covered by the instruction, to the amount of one dollar, and no complaint is made of the charge, so far as it relates to these two items. The objection to the instruction is, that it allows the jury to assess damages for "mental anguish," and it is contended that such damages are not allowable in actions of this kind. Counsel also insisted that, if such damages are recoverable in any case, they should not be allowed here, for the reason that the testimony negatives any such suffering on the part of plaintiff as would entitle him to recover. Disposing of this last proposition first, we have to say that there is sufficient testimony in the record to justify the conclusion that the plaintiff did suffer as claimed. The evidence discloses such conduct on the part of plaintiff in inquiring for a message at the office of the defendant company, and in the efforts put forth by him to ascertain if a death message had come, as to

evinced mental anxiety. Plaintiff says he was desirous of attending his mother's funeral, and that he felt "hard" because of the delay in the delivery of the message. He immediately telegraphed to ascertain if he could be present at the funeral, and took up his journey to Ohio, to be in attendance upon the burial. When he called at defendant's office, after the receipt of the message, he was excited and anxious. He complained of the delay, and wanted to know why the message was not delivered at his house. We think these declarations, and this course of conduct, clearly indicate that plaintiff did suffer as charged. We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message, and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state. The following cases answer the proposition in the affirmative: *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. R. 351, 59 Am. R. 623; *Gulf etc. Ry. Co. v. Wilson*, 69 Tex. 739, 7 S. W. R. 653; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. R. 734, 13 Am. St. R. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423, 11 S. W. R. 385; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. R. 857, 16 Am. St. R. 920; *Womack v. Western Union Tel. Co.*, Tex. Civ. App., May 10, 1893, 22 S. W. R. 417; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. R. 688; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. R. 574, 6 Am. St. R. 864; *Northport etc. R. R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. R. 737; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. R. 163; *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. R. 871; *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. R. 800; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 Sou. R. 419, 18 Am. St. R. 148; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549, 11 S. E. R. 269; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. R. 1044, 22 Am. St. R. 883; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. R. 427; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. R. 880; *Western Union Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. R. 148; *Logan v. Western Union Tel. Co.*, 84 Ill. 468; and perhaps others. While perhaps equally as large a number answer it in the negative. See the following: *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471; *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. R. 408; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. R. 807, 7 Am. St.

R. 530; Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 Sou. R. 823, 24 Am. St. R. 300; Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. R. 901, 30 Am. St. R. 183; Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. R. 345, 38 Am. St. R. 575; International etc. Tel. Co. v. Saunders, 32 Fla. 434, 14 Sou. R. 148; Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. R. 973, 41 Am. St. R. 17; Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. R. 1078, 49 Am. St. R. 507. Perhaps other cases announcing the same rule may be found. Of the text-writers, Shearman and Redfield on Negligence, page 692, section 605; Thompson on Electricity, section 379, 3 Sutherland on Damages, sections 975-980, inclusive; 2 Sedgwick on Damages, section 894, and others, hold that such damages may be recovered, while Wood's Mayne on Damages, page 74, Cooley on Torts, 271, and others, seem to deny it. The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages: See Lynch v. Knight, 9 H. L. Cas. 577; Hobbs v. London, etc. Ry. Co., L. R. 10 Q. B. 122. And doubtless this is the rule of law to-day in all ordinary actions, either *ex contractu* or *ex delicto*. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. The general rule above referred to was adopted long before the electric current was harnessed and made subservient to the will of man. One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into.

Let us look at this query, then, upon principle, and see if such damages are recoverable. And first we must determine the nature, objects, and purposes of telegraph companies; their legal status and duties to the public, and to those with whom they do business, then the nature of the action, and, finally, the elements of damage which may be recovered, either by reason of their breach of contract or because of their failure to perform their duties—and see if there is any reason known to and recognized by the law, why such damage should not be allowed. Far be it from our purpose to make law. We cannot legislate, but will

discover, if we can, whether there are any precedents for recovery lying in the ashes of the past.

What, then, is the nature, purpose, and object of the telegraph, and what is its legal status? It is a system of appliances conducting the electric current or fluid, used for the purpose of transmitting intelligence, thought, or news from one place to another. Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain. We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either *ex contractu* or *ex delicto*, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at page 104 *et seq*: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same state of facts. This, at first, may seem in contradiction to the definition of a tort as a wrong unconnected with contract, but the principles which sustain such actions will enable us to solve the seeming difficulty. . . . There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. . . . Thus, for breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought": See, also, *Rich v. New York etc. R. R. Co.*, 87 N. Y. 382; *Nevin v. Pullman etc. Car Co.*, 106 Ill. 222, 46 Am. R. 688; *Baltimore etc. Ry. Co. v. Kemp*, 61 Md. 619, 48 Am. R. 134; Cooley on Torts, 3. In

this state all forms of action are abolished. The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of the contract or for the tort pleaded. We desire to make this plain, for if, in the further progress of the opinion, it should appear that damages for mental suffering are allowed in cases of this kind, either for breach of contract or for tort, then plaintiff may recover. With this thought in mind, the reader may also be able to explain and reconcile some of the cases before cited.

Having determined the nature and objects, the status, and relation of the defendant company, we turn to the verdict of the jury in this case, and find that not only did the defendant break its contract, but that it was guilty of negligence as well, and that under all known rules of law, plaintiff is entitled to some damages. Defendant insists they are simply nominal, and plaintiff contends he has suffered acute and actual damages, for which he should be compensated. The general rule of damages for breach of contract comes down to us from the opinion of *Hadley v. Baxendale*, 9 Ex. 341, and is as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In actions for tort the rule is much broader. The universal and cardinal principle in such cases is, that the person injured shall receive compensation commensurate with his loss or injury, and no more. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected, so far as they are compensatory, by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force." Whether the injurious consequences may have been "reasonably expected" to follow from the commission of the act is not at all determinate of the liability of the person who committed the act to respond to the person suffering therefrom. As said in *Stevens v. Dudley*, 56 Vt. 158, "it is the unexpected, rather than the expected, that happens in the great majority of

cases of negligence." Under all the authorities, it was the duty of the defendant to transmit and deliver messages intrusted to it without unreasonable delay; and, in failing to do so, it becomes liable for all damages resulting therefrom: Cooley on Torts, 646, 647; Gray on Communication by Telegraph, secs. 81, 82, *et seq*; Wharton on Negligence, sec. 767. That a person is entitled to at least nominal damages for an infraction of the duty imposed upon a telegraph company is conceded. And it must also be conceded that every person desires to attend upon the obsequies of his near relations. And when, able and anxious to attend, he is, through the negligence of a telegraph company, not notified of their death in time to attend the funeral, he naturally and almost inevitably suffers mental pain and anguish. No man is so depraved but that he yet remembers his mother, and, when able, will pay her the last respect that is her due. In the case at bar, it is established that defendant knew the nature of the intelligence it was to transmit, and also knew that, if it was not delivered within a reasonable time, plaintiff was likely to be greatly pained on account not only of not knowing of the death of his mother until she was placed under the ground, but also because of his inability to attend the funeral on account of the delay. That the defendant should reasonably have contemplated such results, under the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, is clear.

But it is insisted that damages for mental suffering, although contemplated by the parties, cannot be recovered for mere breach of contract. That such is the general rule announced by the courts, and that it is the rule with reference to all ordinary contracts must be conceded. But it must be remembered that this rule grew up at a time when there was no thought of the transmission of intelligence by electricity. Breaches of contract, such as the one in question, were unknown to the common law. The business of telegraphy has grown up within comparatively recent years. But must we say that the law furnishes no remedy because no case of the kind was known to the common law? If so, such law is no longer applicable to our present conditions. Regard must be had, too, to the subject matter of the contract. The message does not relate to property. In such cases, for breach of contract, the law affords adequate compensation. But it does relate to the feelings, the sensibilities, aye, sometimes, even to the life, of the individual. It does not affect his pocket-book seriously, but it does relate to his feelings, his emotions, his sensibilities—those finer qualities which go to make the man. Shall we say that in one case the law affords compensation, and in the other it does not? Instead of goods which are con-

veyed by the defendant, it is intelligence—thought. If defendant were a common carrier of goods, it would be liable for all damages sustained by reason of its breach of contract to deliver them within a reasonable time. But it is said no damages can be recovered for failure to deliver intelligence, beyond the amount actually paid for the message, or nominal damages, although the addressee may endure the greatest of mental pangs, notwithstanding the fact that such suffering was in the contemplation of the parties at the time the contract was made. Of course, every breach of contract is likely to cause some pain, but most of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for the pecuniary loss sustained. Mental suffering has never been considered as within the contemplation of the parties at the time the contract is entered into, and recovery cannot be had therefor. But few contracts have direct relation to the feelings and sensibilities of the parties entering into them, and the pain growing out of the ordinary breach of contracts relating to property is entirely different from that suffered from a death message: Sutherland on Damages, sec. 980. We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases, the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case: See *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa, 615. The distinction we have pointed out is well stated in 1 Sutherland on Damages, section 92. Other exceptions have sometimes been made, which we need not further refer to. As said in the case of *Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. R. 574, 6 Am. St. Rep. 864: "These illustrations serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that, therefore, the damages resulting from such breach of contract must be measured by pecuniary standards, and that, where other than the pecuniary benefits are contracted for, other than pecuniary standards should be applied in the ascertainment of damages flowing from the breach." "The case before us, so far as it is an action for breach of contract, is subject to the same general rule; and the defendant is

answerable in damages for the breach, according to the nature of the contract, and the character and extent of the injury suffered by reason of its nonperformance. The message was sent for a particular purpose, of which the defendant had knowledge. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything—no proposition or promise with respect to any business transaction. The message was of far greater importance to the receiver than any of these. It was information which defendant undertook to convey for a stipulated sum, and which, if promptly conveyed, would have enabled plaintiff to have been with him at the last moments, and would have saved her the injury of which she complains. . . . The messages were in proper language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, properly conveyed, would prevent.”

Reverting now to the damages which may be allowed if the action is treated as *ex delicto*, and to the broader rule of damages in cases of tort, we find that, in very many of these actions, damages are recoverable for mental anguish, some of which we will refer to hereafter. It is conceded by appellant’s counsel that such damages may in certain cases be recovered, but they insist that they are never recoverable unless accompanied by some physical injury. It seems to us that, when it is conceded that mental suffering may be compensated for in actions of tort, the right of plaintiff to recover in this case is established. Let us look to some of the cases authorizing recovery in such cases, and see if there are no analogies. Damages for injuries to the feelings are given, though there are no physical injuries, where a person is wrongfully ejected from a train: *Shepard v. Chicago etc. Ry. Co.*, 77 Iowa, 54, 41 N. W. R. 564; in actions for slander and libel: *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. D. 420; for malicious prosecution: *Fisher v. Hamilton*, 49 Ind. 341; for false imprisonment: *Stewart v. Maddox*, 63 Ind. 51; for criminal conversation and seduction, and for assault. So damages for injured feelings were allowed where a conductor kissed a female passenger against her will: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. R. 504. So, likewise, it has been held that the removal of the body of a child from the lot in which it was rightfully buried to a charter plot gives the parent a right to recover for injury to his feelings: *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. D. 759. And a widow may recover for such suffer-

ing and nervous shock, against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damages are alleged or proven: *Larson v. Chase*, 47 Minn. 307, 50 N. W. R. 238, 28 Am. St. R. 370. See, also, *Sutherland on Damages*, sec. 979, and authorities cited for kindred cases. The wrongs complained of in these cases all directly affected the feelings, and injury thereto proximately resulted. But not more so than in the case at bar, where the injury to the feelings is apparent, and suffering necessarily followed. This rule of necessity applies where the feelings are directly affected by the nature of the wrong complained of. It has no application to such mental suffering as indirectly results from the commission of every tort.

Let us now look to our own cases for a moment, and see what has been held. In the case of *Stevenson v. Belknap*, 6 Iowa, 103, 71 Am. D. 392, which was an action brought by a father for the seduction of his daughter, this court approved an instruction that damage may be given, not only for his loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and of his anxiety, as a parent of other children, whose morals may be corrupted by the example. In the case of *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. R. 748, which was an action for an assault by one of defendant's employees upon the plaintiff, the lower court instructed the jury that plaintiff might recover, as compensatory damages, not only for bodily pain and suffering, but for the outrage and indignity put upon him. This instruction was approved, and it was held that mental suffering not arising from bodily pain, but from the nature of the assault, might be recovered, the court using this language: "The question is fairly presented whether mental anguish, arising from the nature and character of the assault, constitutes an element of compensatory damages. . . . We, on principle, are unable to see why mental pain arising from or caused by the nature of the assault whereby the wound was inflicted . . . should not be an element of such damages." "A careful examination of the authorities will disclose the fact that the weight of adjudicated cases is in favor of the proposition that mental anguish arising from the nature and character of the assault is an element of compensatory damages. . . . The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." It may also be said in this connection that the court in this case declined to follow the case of *Johnson v. Wells*, 6 Nev. 224, 3 Am. R. 245, and kindred cases which are relied upon by the appellant's counsel, remarking that "the decided

weight of authority is opposed to the view taken in that case, and we are unwilling to follow it, and by so doing ignore the other authorities cited.” That the question was well considered and deliberately decided is apparent from the fact that Mr. Justice Day dissented from the conclusion of the majority. In the quite recent case of *Shepard v. Chicago etc. Ry. Co.*, 77 Iowa, 58, 41 N. W. R. 564, we went still farther, and squarely held that damages for mental suffering are recoverable, although there was no physical pain or injury. In that case we said: “If these things [wounded feelings] may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. It is said that the ‘mental pain’ contemplated by the court in the case last cited (*McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 315, 24 Am. Rep. 748) includes something more than mere wounded feelings or wounded pride, and that the latter can be considered only where malice is alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it, much must necessarily be left to the discretion of the jury, as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages.” In the case of *Curtis v. Sioux City etc. Ry. Co.*, 87 Iowa, 622, 54 N. W. R. 339, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. In the case of *Parkhurst v. Masteller*, 57 Iowa, 480, 10 N. W. R. 864, which was an action for malicious prosecution, this court followed *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, and held that in such actions actual damages would include compensation for bodily and mental suffering, and clearly held that damages for mental suffering might be recovered in such cases although entirely disconnected from bodily suffering or disability. In a case of assault and battery (*Lucas v. Flinn*, 35 Iowa, 9), this court held that damages for mental anguish might be allowed as compensation. In the case of *Paine v. Chicago etc. R. R. Co.*, 45 Iowa, 569, the rule in *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, was recognized; but it was held there was no right of recovery for injury to feelings, on account of the peculiar facts of that case. And the case of *Fitzgerald v. Chicago etc. R. R. Co.*, 50

Iowa, 79, merely follows *Paine v. Chicago etc. R. R. Co.*, 45 Iowa, 569, and holds that, under the facts, plaintiff was not entitled to recover. The rule of *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 318, 24 Am. Rep. 748, has never, to our knowledge, been doubted by any later decision. In the case of *Stone v. Chicago etc. R. R. Co.*, 47 Iowa, 88, 29 Am. Rep. 458, it was held that the action in that case, owing to its peculiar facts, was an action for breach of contract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts": Citing *Walsh v. Chicago, etc. Ry. Co.*, 42 Wis. 23, 24 Am. R. 376. It is enough to say here that the action at bar is *ex delicto*, or that damages may be recovered as if it were, under our system of code pleading. The only other case having any bearing upon this question is *Hall v. Manson*, 90 Iowa, 585, 58 N. W. R. 881, which was a case where plaintiff sought to recover damages for personal injuries sustained by reason of a defective street crossing. The lower court instructed the jury that plaintiff might recover "for the peril, if any, the jury may find she was subjected to, from the evidence in the case." The court disapproved the instruction, not because damages for mental anguish could be recovered, but because, "in our view of the instruction, its wording would warrant the jury in allowing damages for mental pain and suffering, which would include peril, and also for peril, as a distinct, independent, and additional element of damage, thereby allowing double compensation for the peril plaintiff was in, which would be erroneous."

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The wrong is plain, the injury is apparent, and we think the law affords a remedy, for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions *ex delicto*, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when there is this connection so manifest as in the case at bar, we think such damages ought to be allowed. It

is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact." It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a contrary doctrine from that here announced, recovery was denied because of the form of the action; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions *ex delicto* or not was not determined. Let us look for a moment at some of the objections urged to such a rule as we have announced.

1. It is said that such suffering is speculative and remote. We have, as we think, answered this by showing that in actions of this kind it is direct and proximate to the wrong complained of.

2. It is urged that such damages are sentimental, are vague and shadowy, and that there is no standard by which an injury can be justly compensated or approximately measured. This objection is answered if we find any case in which such damages are allowed, for if they may be allowed in one kind of case they may in all, so far as this objection is concerned. We have already seen numbers of cases, both from this and other states, wherein it is held that damages for mental suffering, independent of physical injury, may be recovered. It is conceded by counsel that damages can be recovered for mental suffering when accompanied by physical pain or bodily suffering. If this be true, then let us ask how they can be any more accurately measured when so accompanied than when not. When it is once conceded that mental anguish can be considered, and compensation made therefor, then the objection last urged falls to the ground.

3. It is said there is no principle on which such damages can be recovered. We have endeavored to show, to the best of our ability, that there is abundant authority to justify a recovery in such cases.

4. It is contended that the rule opens up a vast and fruitful

field for speculative litigation. We have endeavored to so guard and limit the rule that there may be no mistaking its operation and effect. If recovery is for breach of the contract, then it can only be had because of the subject matter—the fact that it is intelligence that is transmitted, and the feelings only affected. And, if the recovery is had because it is a tort, then a somewhat similar limitation is made, which we have tried to make apparent. If, as thus limited, the rule opens up a vast and fruitful field of litigation, it is only because telegraph companies fail to do their duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company is to make transmission and delivery of messages intrusted to it with promptitude and accuracy. When that is done its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence and that in actual practice no evil can result therefrom. Juries may be prone, in cases of this kind, to place their estimates high; but the judge is ever present, with a restraining power, ample to prevent unconscionable and unjust verdicts. Without further extending this opinion, it is sufficient to say that the instruction of the district court was correct, and the judgment is affirmed.

186. WEST V. WESTERN UNION TELEGRAPH CO.,

39 Kan. 93; 17 Pac. R. 807; 7 Am. St. R. 530. 1888.

HORTON, C. J. This was an action brought by George West against the Western Union Telegraph Company to recover ten thousand dollars damages, occasioned, as claimed in the petition, by the gross and malicious negligence of the company to transmit and deliver the following telegraphic message:—

“NORTH TOPEKA, KANSAS, September 14, 1885.

“To GEORGE WEST, Delphos, Kansas, care Post-office.

“Uncle Sam died last night; funeral Wednesday.

JOHN G. WEST.”

Upon the trial, after the plaintiff had closed his evidence, the telegraph company interposed, and filed a demurrer thereto,

upon the ground that no cause of action was proved. The court sustained the demurrer. The plaintiff excepted, and brings the case here for review.

The testimony introduced tended to show that the foregoing written message was handed by John West, the son of George West, to the agent of the telegraph company, at its office at North Topeka, on the afternoon of its date, with directions "to forward it immediately"; that the message was ordered by John West to be sent for the benefit of his father; that he paid the agent forty cents for sending the message; that subsequently his father repaid to him the money; that Delphos is about one hundred miles west of North Topeka; that at the date of the message, and subsequently, it was operating a telegraph line for hire between the towns of North Topeka and Delphos, with an office in each town; that George West has resided in Kinmundia, Illinois, since 1859; that in September, 1885, he was visiting in Kansas, and at the date of the message, and for several days thereafter, was with friends in the neighborhood of Delphos; that Samuel C. West was his oldest brother, and after his death that he had no other brother living; that Samuel lived at Philadelphia, Pennsylvania, and at the time of his death was seventy-eight years of age; that George West was seventy-three years of age; that he was expecting to hear of the death of his brother, on account of his ill health, and was anxious to attend his funeral, if notified in time; that while in Kansas he had so fixed his matters as to start at a moment's warning to attend the funeral; that on September 14, 1885, he inquired at the post-office at Delphos for his mail, but did not receive the telegram; that he inquired frequently afterward, and sent others to inquire for his mail, but never received the telegram; that subsequently he learned by a letter from his son John of the death of his brother Samuel, but the information came too late for him to attend the funeral; that if he had received the telegram within a reasonable time after it had been sent, he could have attended the same; that his son John informed the agent at the office of the telegraph company in North Topeka that the message had never been delivered; that George West also inquired at the office of the telegraph company at Delphos on the morning of the 18th of September for the telegram; that the agent said that none had been received for him; that he then told the agent "he would investigate the matter," and he replied "he had received none, and that none could have been received without his knowing it"; that both George West and John West were informed by the agent at North Topeka that the message had been sent over the wire at its date to Delphos; that the tele-

gram was never delivered to the post-office at Delphos, or to George West, by the agent of the telegraph company, or any one else.

Upon what grounds the trial court sustained the demurrer to the evidence is not clearly disclosed. In our opinion, the demurrer should have been overruled, as there was ample evidence introduced for the case to go to the jury. The message was written and delivered at the office in North Topeka, and paid for by John West, the son of the plaintiff, for the benefit of the latter. Subsequently, George West returned to his son the money paid by him to the telegraph company, and ratified and approved his son's acts in the transaction, in all respects as if the message originally had been written and sent under his direction. In *Burton v. Larkin*, 36 Kan. 246, 13 Pac. R. 398, 59 Am. R. 541, it was held that a "person for whose benefit a promise to another, upon a sufficient consideration, is made may maintain an action on the contract in his own name against the promisor." In *Dresser v. Wood*, 15 Kan. 344, it was held "that where an action is commenced by an attorney at law, without the knowledge or consent of the plaintiff, the plaintiff may afterward ratify the same, and thereafter be entitled to all its benefits." The contract, therefore, made by the son with the telegraph company, for the benefit of his father, which was afterward approved and ratified by the father, was sufficient as the basis of this action. The plaintiff, upon the evidence introduced, was entitled to recover judgment against the defendant for his actual damages, including the forty cents paid for the transmission of the message: *Western Union Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. R. 313; *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. R. 309; *Logan v. Telegraph Co.*, 84 Ill. 468.

Further than this, if upon another trial it shall be established that there was such gross negligence on the part of the agents of the telegraph company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message, then the plaintiff would be entitled to exemplary damages. Such damages are given more to punish the wrong-doer than to recompense the party injured: *Scott and Jarnagin on Telegraphs*, secs. 417, 418; *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. R. 817, and cases cited therein. In *Schippel v. Norton*, 38 Kan. 567, 16 Pac. R. 804, we recently held where no actual damage is suffered, no exemplary damages can be recovered; but as actual damages are shown in this case, that decision is not applicable.

It seems, however, to be claimed upon the part of the plaintiff

that he is entitled to recover for his mental anguish or suffering occasioned by the delay in the announcement of the death of his brother. Where mental suffering is an element of physical pain, or is a necessary consequence of physical pain, or is the natural and proximate result of the physical injury, then damages for mental suffering may be recovered, where the injury has been caused by the negligence of the defendant; but in an action of this kind, we do not think that damages for mental anguish or suffering can be allowed. "Such damages can only enter into and become a part of the recovery where the mental suffering is the natural, legitimate, and proximate consequence of the physical injury": *City of Salina v. Trosper*, 27 Kan. 544. The general rule is, "that no damages can be recovered for a shock and injury to the feelings and sensibilities, or for mental distress and anguish caused by a breach of the contract, except a marriage contract": *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. R. 408. In *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. R. 805, it was decided that an action for mental suffering alone can be maintained. The opinion in that case, however, was prepared by a member of the commission of appeals of Texas. And subsequently, in the case of *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 563, 46 Am. R. 278, the supreme court of Texas overruled that decision: See, also, *Wood's Mayne on Damages*, 1st Am. ed., 74.

We also add that the trial court should have permitted the plaintiff to show the arrangements made with his son John to forward to him at Delphos all telegrams and mail matter that came addressed to him at Topeka.

The judgment of the district court will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed.

INDEX.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—

- delivery not complete until, 19.
- of guest, 40, 51, 56, 57, 58.
- by common carrier, 81, 82.
 - evidence of acceptance, 82.
 - bill of lading issued without goods, 84.
- of a passenger, 129-131, 135, 137, 139.
- see also DELIVERY.

ACCOMMODATIONS—

- carrier must furnish, 80.
 - sufficient accommodations, 67, 68, 85.
 - preferences, 73, 74, 79, 80, 85.
 - unusual demand, 67, 68, 85.
- of passenger carrier, 149, 151-153.
- of telegraph and telephone companies, 172, 173.

ACTIONS—

- by bailor or bailee against third persons, 13, 14, 37, 41.
- against pledgee for wrongful sale, 21.
- of trover against hirer for conversion, 12, 33, 34.
- by hirer against third persons, 14, 47.
- by bailor and bailee in *locatio operis* bailments, 37, 41, 47.
- against carrier for refusal to carry, 62, 63.
- against connecting carriers, 83, 124, 127.
- against common carriers of goods—
 - the parties, 76, 122, 177.
 - contract action, 79.
 - consignor agent of consignee, 177.
 - tort action, 177.
- the form of action, 79, 177, 185.
 - modern procedure, 185.
- the evidence—
 - see BURDEN OF PROOF.
- the damages for injury to or loss of goods, 178, 180, 185.
 - proximate cause, 178-180.
 - measure of damages, 178, 179.
 - for default in carrying, 67, 85, 168, 178, 179.
- against carriers of passengers—
 - the parties, 133, 181.

[REFERENCES ARE TO SECTIONS.]

ACTIONS—Continued.

the pleadings, 134.

the evidence, 131, 153.

the damages, 159, 181.

for wrongful ejection, 142, 182.

for mental-suffering or fright, 183, 185.

exemplary damages, 142, 182.

against carriers of intelligence—

against telegraph and telephone companies—

the parties, 169, 174, 185, 186.

contract action against sender or his principal, 185.

tort action on common law duty, 170, 185.

the evidence, 167, 169, 174.

the damages, 168, 169, 174, 185.

duty to disclose importance of message, 167, 168, 184.

for mental suffering, 172, 185, 186.

ACT OF GOD—

defined, 62, 88, 89.

distinguished from inevitable accident, 62.

as excuse in case of delay, 89.

ACT OF SHIPPER—

as excuse for loss of goods by carrier, 87, 92, 93, 100.

ADVERSE CLAIMS—

see INTERPLEADER.

redelivery by bailee, 3.

cannot be set up by borrower, 3.

AGENT—

of bank in accepting deposit, 19.

of carrier has authority to contract to furnish cars, 67.

in contracts as to liability of common carrier, 66, 107.

in shipping goods over connecting lines, 77, 114, 125.

liability of passenger carrier for acts of, 129, 135, 136, 141.

must be competent, careful and courteous, 154.

of Postoffice Department—

employees are, 166.

of telegraph and telephone companies, 167, 170, 172, 173, 185.

telegraph company whose agent, 169, 174, 185, 186.

AGISTERS AND LIVERYMEN—

have no lien, 40.

ANIMALS—

redelivery of, 2, 16.

carrier's liability for losses, 85, 94-96, 104.

railroads, common carriers of live stock, 85, 94-96, 106.

ASSIGNMENT—

by bailee, 2.

of bill of lading, 49, 84.

of pledge by pledgee, 22, 23, 26, 30.

of corporate stock, 28.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—

- of guest at inn, 51, 56.
 - measure of innkeeper's liability, 50, 54, 58, 59, 60.
 - exceptions, 61.
 - burden of proof, 58, 61.
 - goods must be *infra hospitium*, 40.
 - effect of owner's custody, 52, 53, 61.
- of passenger—
 - carrier an insurer of, 100, 152, 162.
 - what is baggage, 93, 119, 165.
 - value of, 93, 119, 163.
 - compensation for carrying, 93, 119.
 - custody of passenger, 53, 54, 93, 164.
 - passenger supposed to accompany, 165.
 - delivery of, 165.

BAGGAGE CHECKS AS CONTRACTS LIMITING CARRIER'S LIABILITY—

see TICKETS.

BAILMENT—

- defined, 1, 2.
 - contractual relation, 2, 13.
 - delivery and acceptance necessary, 19.
 - subject matter any personal chattel, 25.
 - possession transferred, but not title, 2, 3.
 - bailment distinguished from sale, 4.
 - redelivery, 2, 3, 4, 14.
- classified, 1, 2, 8.
- general principles applicable to all bailments—
 - care, 1, 5, 6, 7.
 - see CARE.
 - three degrees, 1, 6, 7, 8, 19, 103, 135.
 - consideration, 1, 6, 10.
 - expenses, 11.
 - defect in bailed chattel, 11.
 - right to use, 1, 12, 34.
 - property of bailee, 1, 2, 13, 14, 41.
 - liability to third persons, 23.
 - termination of the relation—
 - bailment contract executed, 15.
 - rescission of bailment contract, 12, 15, 32.
 - redelivery, 1, 11, 17, 19.
 - what, 2, 4, 16.
- see also the various classes of bailments.

BANK—

see DEPOSITS, SAFETY-DEPOSIT COMPANIES.

BILL OF LADING, WAREHOUSE RECEIPT—

- nature of warehouse receipt, 24, 49.
- as evidence of acceptance by carrier, 82.

[REFERENCES ARE TO SECTIONS.]

BILL OF LADING, WAREHOUSE RECEIPT—Continued.

- a receipt and a contract, 69, 83.
- issued without goods, 84.
- as a contract, 69, 83, 114.
- assignability and negotiability, 49, 84.
- nature of bill of lading, 49, 84, 114, 121.
- duplicate bills, 49.
- liability of carrier for delivery on unindorsed bill, 49, 121.
- as contract limiting liability of common carrier—
 - must be assented to by shipper, 66, 79, 114.
 - cannot be varied by parol, 69, 107.
 - must be delivered with the goods, 101.
- as evidence of right to receive goods, 49, 121.
- as directions for shipment, 77.

BOARDING AND LODGING HOUSES—

- not inns, 50-54.

BORROWING—

- see GRATUITOUS LOANS.

BURDEN OF PROOF—

- in showing negligence of bailee, 5, 9, 43.
- on innkeeper, 58, 59, 61.
- on carrier in case of losses due to excepted perils, 68, 89, 92, 97.
- in case of losses due to causes exempted in contract, 79, 83, 97, 100.
- for failure to perform duty, 85.
- on passenger carrier in case of accident, 131, 153, 155, 160.
- in action *ex delicto* against carriers of goods, 89, 114.
- on telegraph companies, 167, 169, 174.

CARE—

- see NEGLIGENCE.
- required in various classes of bailments, 1, 5-7.
- three degrees, 1, 6-8, 19, 103, 135.
- burden of proof in showing, 5, 9, 43.
- is question of fact for jury, 5, 6, 14.
- required of mandatory and depositary, 1, 5, 7, 15, 19, 20.
- same care as of one's own, 1, 5, 6, 19, 20.
- special skill, 6, 7, 135.
- facts equally within knowledge of both parties, 1, 20.
- liability for misfeasance and non-feasance, 10.
- required of borrower, 1, 8, 15.
- required in mutual benefit bailments, 1, 19.
- of pledgee, 1, 7.
- of bailee for hire, 1, 47.
- of warehouseman, 9, 43.
- required in extraordinary bailments, 67, 235, 347, 392.
- diligence of carrier when overtaken by Act of God, 89.
- in case of delay, 99.
- burden of proof in showing, 79, 83, 89, 97.

[REFERENCES ARE TO SECTIONS.]

CARE—Continued.

- of passenger carrier, 151-154.
 - the measure of diligence, 100, 131, 135, 152, 153, 155-159.
 - as to gratuitous passengers, 103, 129, 133-136.
- sleeping car companies, 53, 54.
- owners of passenger elevators, 160.
- of telegraph and telephone companies, 167, 170, 172, 173, 185.

CARRIERS—

see PRIVATE CARRIERS, COMMON CARRIERS, CONNECTING CARRIERS, CARRIERS BY WATER, CARRIERS OF PASSENGERS, CARRIERS OF INTELLIGENCE, ELEVATORS, STEAMBOATS, SLEEPING CARS, TELEGRAPH AND TELEPHONE COMPANIES, POSTOFFICE DEPARTMENT.

CARRIERS BY WATER—

where make delivery, 108, 110-114.

CARRIERS OF INTELLIGENCE—

see POSTOFFICE DEPARTMENT, TELEGRAPH AND TELEPHONE COMPANIES.

CARRIERS OF PASSENGERS—

- are quasi-bailees, 65.
- definition, 65.
- illustrations, 54, 65, 129.
- passengers defined, 129, 130, 133.
- relation established by—
 - offer to become passenger, 131, 154, 157.
 - special callings, 132.
 - employees not passengers, 129, 133-135.
 - payment of fare not necessary, 103, 129, 134, 136.
 - trespassers, 130, 151.
- acceptance by carrier, 129, 130, 131, 135.
- what amounts to, 130, 131, 137, 139.
- rights and duties of carriers of passengers—
 - by operation of law—
 - right to compensation—
 - fare, 138, 139.
 - tickets, 138, 140-142.
 - sale of, 140, 142.
 - nature of, 102, 138, 144.
 - as contract with passenger, 102, 125, 141, 143, 144.
 - as between passenger and conductor, 141, 145, 146.
 - conditions printed on, 102, 134, 143, 144.
 - stop-overs, coupon and limited tickets, 102, 144, 147, 148, 151.
 - right to make regulations, 131, 138, 139, 142, 144, 145, 148, 162.
 - must be reasonable, 141, 142, 146, 149-151, 157.
 - ejection of passenger for breach, 139, 140, 149, 150.
 - duty to accept all, 129, 149, 150.

[REFERENCES ARE TO SECTIONS.]

CARRIERS OF PASSENGERS—Continued.

duty to furnish accommodations—

must be equal, 149.

must be adequate and safe, 151-155.

roadbed and bridges, 154, 158.

agents and servants, 154.

stational facilities, 131, 157, 158.

liability for injuries to passenger—

measure of diligence, 100, 103, 129, 131, 135, 136, 152, 153, 155-158.

as to gratuitous passengers, 103, 129, 135, 136.

contributory negligence of passenger, 131, 157, 158.

what amounts to, 131, 154, 158, 159.

must be proximate cause, 156.

of owners of passenger elevators, 160.

liability of sleeping car companies, 53, 54.

liability for delay, 161.

liability for baggage, 100, 119, 152, 162.

what is baggage, 93, 119, 163, 165.

value of, 54, 93, 119, 163.

custody of passenger, 53, 54, 93, 164.

passenger supposed to accompany, 165.

delivery of, 165.

under special contract—

as to baggage, 102.

as to passenger, 134.

gratuitous passengers, 103, 133, 134.

termination of the relation—

contract executed, 125, 154, 157, 158, 159.

passenger may leave conveyance, 144, 147, 154, 157.

ejection of passenger, 139-142, 151.

actions against, 181-183.

see ACTIONS.

CASH ON DELIVERY—

shipments C. O. D. by express, 117.

CAUSE—

see PROXIMATE CAUSE.

CHATTEL MORTGAGE—

see PLEDGE.

COLLATERAL SECURITY—

see PLEDGE.

COMMODATUM—

classified, 1, 2, 6.

see also GRATUITOUS LOANS.

COMMON CARRIERS OF GOODS—

definitions and classification, 1, 62-65, 68, 95.

public employment, 62, 63, 65, 73, 79, 80, 85, 95.

for hire, 62, 103.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIERS OF GOODS—Continued.

- kinds of goods carried, 62, 65, 85, 95, 96.
- action for refusal, 62, 63.
 - illustrations, 55, 64-66, 80.
 - who not common carriers, 53, 66.
- right to compensation, 62, 67-69, 100.
 - amount of compensation, 202.
 - statutory control, 70, 71.
 - demurrage, 72.
 - discrimination—
 - what is unlawful, 73, 74.
 - on what goods, 75.
 - who liable, 76.
- carrier's lien, 42, 46, 67, 72, 79.
 - connecting carriers, 46, 76, 77.
 - storing goods held on lien, 72.
 - goods shipped by one not the owner, 78.
- duty to carry for all, 68, 69, 79, 80, 100.
 - when liability begins, 68, 81.
 - delivery and acceptance, 67, 81, 82.
 - evidence of acceptance—
 - bill of lading, 82, 83.
 - issued without goods, 84.
 - as a contract, 69, 83.
 - assignability and negotiability, 49, 84.
 - nature of bill of lading, 49, 84.
 - duplicate bills, 49.
- accommodations—
 - suitable accommodations, 73, 80, 85, 94.
 - must be sufficient, 67, 68, 85.
 - preferences, 73, 74, 79, 80, 85.
 - unusual demand, 67, 68, 85.
 - need not accommodate express companies, 86.
- liability for loss—
 - common law rule, 1, 62, 64, 66, 68, 79, 87, 93, 100.
 - exceptions, 62, 64, 66, 68, 79, 87-89.
 - Act of God, 1, 64, 88, 89.
 - distinguished from inevitable accident, 62.
 - proximate cause, 89.
 - see PROXIMATE CAUSE.
 - diligence of carrier, 89.
 - public enemy, 1.
 - public authority, 90-92.
 - act of shipper, 87, 93.
 - concealing value, 92, 93, 100.
 - inherent nature of the goods, 94, 106.
 - live animals, 85, 94-96, 104, 106.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIERS OF GOODS—Continued.

- burden of proof in case of loss from excepted perils, 80, 92, 97.
- liability for deviation and delay, 35, 67, 97-99, 101.
 - effect of delay on losses caused thereby, 67, 98, 99.
 - reasonable time, 97, 98.
 - delay not sole cause for loss, 89, 178.
- contract affecting carrier's liability, 62, 64, 65, 79, 100, 103.
 - enlarging liability, 66, 85.
 - restricting liability, 79, 103.
 - historical account, 100, 103.
 - must be express, 79, 92, 97, 105.
 - by public notice, 64, 79, 100.
 - reveal value of goods, 62, 93, 100, 105.
 - rules and regulations, 114.
 - limiting liability for loss, 62, 66, 79, 92.
 - English rule, 100, 103.
 - American rule, 79, 100, 103, 114.
 - by special contract—
 - the earlier cases, 62, 68, 103.
 - United States rule, 79, 103, 114.
 - form of special contracts—
 - bill of lading, 66, 114.
 - assent of shipper necessary, 66, 79, 114.
 - not varied by parol, 69, 107.
 - must be delivered when goods are accepted, 101.
 - parol contract, 82, 101.
 - tickets, baggage checks, etc., 102.
 - extent of the limitation—
 - reasonable and just, 66, 103.
 - as to the nature of the liability, 66, 79, 103, 106.
 - special rules in certain States, 103, 104.
 - as to the amount of the liability, 105, 106.
 - common law duty remains, 79, 97, 103, 114.
 - consideration for the contract, 105, 114.
 - parties to the contract, 114.
 - agent of the carrier, 107.
 - burden of proving loss due to exempted cause, 79, 83, 97.
 - termination of the relation—
 - by delivery, 68, 108, 115.
 - reasonable time, 98, 110, 111.
 - proper place, 98, 108-110.
 - by carriers by water, 108, 110, 111.
 - by railroads, 112-114.
 - by express companies, 109, 115, 116.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIERS OF GOODS—Continued.

- shipment C. O. D., 117.
- the right person, 118, 120.
 - effect of fraud, 118, 119.
 - presentation of bill of lading, 49, 121.
 - consignee presumptively proper party, 46, 121, 122.
 - interpleader if dispute as to proper party, 120.
- to a connecting carrier, 68, 77.
 - duty to carry beyond carrier's route, 68, 107, 115, 124.
 - partnership arrangements, 123, 124.
 - receiving goods directed beyond carrier's line, 68, 124.
 - American rule, 124, 125.
 - special contract as to carriage, 107, 124, 125.
 - carriers agents of consignor, 77, 114.
 - what amounts to delivery to connecting carrier, 81, 126.
 - presumption as to carrier liable, 68, 83, 97, 127.
 - benefit of contract exemptions to connecting carriers, 114.
- to a warehouseman, 72, 110, 112, 113.
 - what constitutes—
 - Massachusetts rule, 113.
 - New Hampshire rule, 112.
 - Michigan rule, 114.
 - delivery by carriers by water, 108, 110, 111.
 - manner of delivery, 110.
 - to an elevator, 80.
- by excuses for non-delivery, 98, 120, 121.
 - see ACT OF GOD, PUBLIC ENEMY, PUBLIC AUTHORITY, ACT OF SHIPPER, ANIMALS.
 - stoppage in transitu, 46, 78, 128.
 - inability to find consignee, 108-111, 117.
- actions against, 177-180.
 - see also ACTIONS.

COMPENSATION—

- in deposits and mandates, 6, 7, 18, 19.
- in gratuitous loans, 10.
- in mutual benefit bailments, 18, 36.
- of innkeeper, 40.
- of carrier of goods, 62, 67, 68, 93, 100, 103, 105.
 - amount, 69.
 - statutory control, 70, 71.
 - demurrage, 72.
 - discrimination, 73, 74.
 - on what goods, 75.
 - who liable, 76.

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—Continued.

- carrier's lien, 46, 67, 72.
- extends to connecting carriers, 46, 77.
- of carrier of passengers, 138, 139.
- see FARE, TICKETS.
- for baggage, 93, 119.
- of telegraph and telephone companies, 172, 173.
- right to regulate by statute, 70, 176.

CONNECTING CARRIERS—

- lien for freight, 46, 76, 77.
- delivery to, 77.
- duty to carry beyond carrier's route, 68, 107, 115.
- partnership arrangements, 123, 124.
- receiving goods directed beyond carrier's line, 68, 124, 125.
- American rule, 114, 124, 125.
- special contract as to through carriage, 107, 124, 125.
- carriers agents of consignor, 77, 114.
- what amounts to delivery to, 81, 126.
- presumption as to carrier liable, 68, 83, 97, 127.
- benefit to of contract exemptions, 114.
- carrying passenger on coupon ticket, 144, 147.
- liability of for baggage, 100, 119, 162.

CONSIDERATION—

- in bailment contracts, 1, 10, 18.

CONSIGNEE—

- prima facie* liable for freight, 76, 122, 177.
- rights subject to carrier's lien, 46, 78.
- presumptively proper party to receive goods from carrier, 116, 121, 122.
- carrier's inability to find, 108-111, 117.
- action by against carriers of goods, 76, 79, 122, 177.

CONSIGNOR—

- liable for freight when, 76.
- right subject to carrier's lien, 46, 78.
- carrier liable to for delivery without indorsed bill of lading, 49, 121.
- connecting carriers agents of, 77.
- stoppage of goods *in transitu* by, 46, 78, 128.
- action by against carriers of goods, 76, 79, 122, 177.

CONTRACTS—

- consideration, 1, 10, 18.
- as to redelivery, 3, 17, 113.
- as affecting rights and duties of gratuitous bailees, 1, 7, 19, 20.
- in pledge, 21, 25, 32.
- as to sale of pledge, 31, 32.
- may fix relations of parties in *locatio operis* bailments, 44, 62.
- compensation under, 36.
- warehouse receipts as, 24, 49.
- limiting liability of innkeeper, 61.
- fixing compensation of carrier, 62, 69, 74.

[REFERENCES ARE TO SECTIONS.]

CONTRACTS—Continued.

affecting liability of carrier of goods—

see COMMON CARRIERS OF GOODS, CONNECTING CARRIERS.

bills of lading as, 66, 69.

limiting liability of passenger carrier—

see CARRIERS OF PASSENGERS.

limiting liability of telegraph companies—

see TELEGRAPH AND TELEPHONE COMPANIES.

CONTRIBUTORY NEGLIGENCE—

of guest, 59-61.

of shipper of goods, 87, 93.

of passenger, 54, 131, 156, 158.

what is, 131, 154, 158, 159.

must be proximate cause, 156.

CONVERSION—

by wrongful use by bailee, 1, 6, 7, 12, 34.

redelivery to wrong person, 3, 17, 118-120.

by wrongful use by pledgee, 1, 21.

by pledgee's misapplication of property, 1, 23, 25, 29.

measure of damages, 25, 29.

terminates pledge, 25, 44.

by wrongful use by hirer, 33.

what amounts to, 12, 33, 34.

trover for, 33-35.

by warehouseman or elevator owner, 48, 72.

delivery to wrong connecting carrier amounts to, 77.

damages against carrier for, 35, 77, 179.

see TROVER.

CORPORATIONS—

in bailments, 19.

CUSTOM AND USAGE—

as to expenses in *locatio rei*, 11.

important in case of warehouseman, 48.

as to carrying express companies, 86.

effect on agent's power to contract for carrier, 84, 107, 114, 135.

as to delivery to connecting carriers, 68, 81, 115, 126.

as to delivery of baggage, 119, 162.

DAMAGES—

recovered by bailee against third person, 14.

against sleeping car companies, 54.

for conversion of property by pledgee, 25, 29, 31.

for wrongful ejection of passenger, 139, 140, 142, 151, 182.

against carrier for keeping incompetent agent or servant, 154.

for injury to or loss of goods, 178, 180.

measure of damages, 179.

for default in carrying, 67, 85, 168, 177-179.

against passenger carriers—

the measure, 159, 181.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—Continued.

for wrongful ejection, 140-142, 182.

exemplary damages when, 142, 182.

for mental suffering or fright, 183, 185.

against telegraph and telephone companies—

for negligence in transmitting and delivering, 168, 169, 184.

causing mental suffering, 172, 185, 186.

DEATH—

action for injury causing, 181.

DEFECT—

in bailed chattel, 11.

in passenger vehicle, 151-153.

in roadbeds and bridges, 153, 154.

in station facilities, 131.

DELAY—

liability of carrier for losses due to, 67, 68, 85, 89, 97-99, 111.

liability for of passenger carriers, 161.

of telegraph and telephone companies, 174.

damages against carriers of goods for, 67, 85, 178, 179.

DELIVERY—

not complete until acceptance, 19.

essential in pledge, 23, 24.

to common carrier, 67, 81, 82.

of bill of lading, 101.

by common carrier—

see COMMON CARRIERS OF GOODS.

of baggage, 165.

of telegraph message, 175, 176.

DEMAND—

by bailor to terminate bailment, 14, 17, 33, 41, 47, 120.

DEMURRAGE—

when allowed to carriers, 72.

DEPOSITUM—

see GRATUITOUS SERVICES.

DEPOSITS—

see GRATUITOUS SERVICES.

special bank, 19.

with safe-deposit companies, 7.

DEPOT—

see STATIONAL FACILITIES.

DEVIATION—

makes carrier absolutely liable, 35, 98.

DILIGENCE—

see CARE, NEGLIGENCE.

DISCRIMINATION—

in receiving guests, 50, 51, 53, 56.

in freight rates, 73, 74.

in providing accommodations, 79.

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—Continued.

- the Express Cases, 86.
- in accommodating passengers, 149, 151.
- by telegraph and telephone companies, 167, 173, 176, 185.

DROVER'S PASS—

- see FARE, CARRIERS OF PASSENGERS.

EJECTION OF PASSENGER—

- for refusal to pay higher fare on train, 140-142.
- for presenting defective ticket, 139, 141.
- for breach of regulations, 138, 139, 142, 149, 151.
- damages for, 140-142, 182.

ELEVATORS—

- whether grain is bailed in, 4.
- as warehouses, 43, 70.
- delivery to by carrier, 80.
- owners of passenger elevators—
 - are carriers of passengers, 160.

EVIDENCE—

- see BURDEN OF PROOF.
- parol to vary bill of lading, 69, 82, 83, 107.
- in actions against carriers of goods, 79, 89, 114.
 - against carriers of passengers, 131, 153.
 - against carriers of intelligence, 167, 169, 174.

EXPENSES—

- in bailments in general, 11.
- as to pledge, 16, 27.
- in *locatio rei* bailments, 11.

EXPRESS COMPANIES—

- are common carriers, 66, 116.
- railroad not common carrier of, 73, 86.
- delivery by, personal, 109, 115, 116.
 - shipment C. O. D., 117.

EXTRAORDINARY BAILMENTS—

- see INNKEEPERS, COMMON CARRIERS.

FARE—

- payment not necessary to constitute one passenger, 103, 129, 134, 136.
- passenger carrier's right to, 138, 139.
 - tickets as evidence of payment, 144, 146.
- payment of covers cost of carrying baggage, 93, 100, 119, 162.

FINDER OF LOST GOODS—

- as bailee, 13, 19.

FIRE—

- see ACT OF GOD, INNKEEPERS.

FRAUD—

- see NEGLIGENCE, CONTRACTS.
- gross negligence an evidence of, 1, 19.
- as to revealing to carrier value of goods, 92, 93, 100, 105, 163.
- will not excuse delivery to wrong person, 118-120.

[REFERENCES ARE TO SECTIONS.]

FRAUD—Continued.

- as to becoming a passenger, 130.
- against telegraph and telephone companies—
see VALUE.

FREIGHT—

- carrier's right to, 67, 68.
- discrimination, 73, 74.
- on what goods, 74.
- who liable, 76.

GRATUITOUS LOANS—

- defined, 1.
- nature of the relation—
 - no recompense, 10, 18.
 - property of bailee, 3, 14.
- rights and duties of the parties—
 - care, 1, 8, 15.
 - right to use, 15.
- termination of the relation, 3.
- redelivery, 1, 3, 17.

GRATUITOUS SERVICES—

- defined, 1, 6.
- deposits and mandates compared, 6.
- the nature of deposits and mandates—
 - no compensation, 1, 6, 7, 10, 18.
 - special bank deposits, 7, 19.
- rights and duties of the parties—
 - diligence, 1, 5, 6, 7, 19, 20.
 - same care as of one's own, 1, 5, 6, 19, 20.
 - special skill, 6, 7, 8, 135.
 - facts equally within knowledge of both parties, 1, 20.
 - misfeasance and non-feasance, 10.
 - right to use, 6, 7, 19.
- termination of the relation, 19.

GUEST—

- defined, 40, 56.
- who not a guest, 40, 50-52, 56.
- how long a guest, 40, 50, 56.
- right to resort to inn, 40, 50, 51, 53, 56.
- excuses for refusal to receive, 51, 56.
- right to bring goods to inn, 50, 51, 53.
- liability of innkeeper to, 50, 51.
- negligence of guest, 61.
- termination of relation, 40.

HIRE—

- see *Locatio* BAILMENTS.

HOTEL—

- see INNKEEPER.

[REFERENCES ARE TO SECTIONS.]

INJURIES—

see **LIABILITY, NEGLIGENCE, COMMON CARRIERS OF GOODS, CARRIERS OF PASSENGERS.**

INJUNCTION—

against common carriers, 73.

INNKEEPER—

history of inns, 50.

definition, 50-53.

extent of accommodations, 50, 52, 54.

who are not innkeepers, 50, 53, 54.

sleeping-car companies, 53, 54.

steamboat companies, 55.

boarding, lodging and restaurant keepers, 50-54.

holding out to the public, 50, 52.

his guest, 40, 56.

acceptance by innkeeper, 57, 58.

entertainment furnished, 50, 52, 53, 56.

not compelled to receive all, 40, 51, 56.

duration of relation, 40, 50, 56.

duty to receive, 40, 50, 51, 53, 54, 56, 57.

liability of innkeeper—

for goods brought to the inn, 40, 50, 51, 56.

rules of liability for loss of goods, 50, 51, 54, 58-60.

exceptions, 50, 52, 59, 61.

burden of proof, 58, 59, 61.

for what property, 40, 52-55, 57, 59.

owner's custody, 52, 53, 61.

limitation of liability, 61.

compensation and lien, 38, 40, 54.

termination of relation, 40.

INSURANCE—

see **PROPERTY of bailor and bailee.**

INTERPLEADER—

in adverse claims, 3.

by common carrier in delivery of goods, 120.

LEGISLATION—

see **STATUTES.**

LENDING—

see **GRATUITOUS LOANS.**

LIABILITY—

see **CARE, DAMAGES, NEGLIGENCE.**

for wrongful use of bailed chattel, 1, 6, 7, 12, 34.

for misfeasance and nonfeasance, 10.

of innkeeper to guest—

for guest's goods, 50, 51, 53, 54, 56, 58-60.

exceptions, 50, 52, 61.

burden of proof, 58, 59, 61.

for what property, 40, 52-55, 57.

[REFERENCES ARE TO SECTIONS.]

LIABILITY—Continued.

- of common carrier of goods—
see COMMON CARRIERS OF GOODS.
- of carrier of passengers—
see CARRIERS OF PASSENGERS.
- of Postoffice Department and employees, 166.
- of telegraph and telephone companies—
see TELEGRAPH AND TELEPHONE COMPANIES.

LIEN—

- defined, 37.
- distinguished from chattel mortgage and pledge, 23-25.
- compensation of bailee for hire secured by, 37, 46.
- who can give, 38, 39.
- basis, 37, 40-42.
- not extended to agisters and liverymen, 40.
- kinds of, 42.
 - how regarded by courts, 26, 42.
 - their extent, 42, 43, 46.
- enforcement of, 44, 45, 77.
- waiver of, 37.
- termination, 44.
- of warehouseman, 42, 43.
- of pledgee, 26.
- of innkeeper, 38, 40, 54.
- of carrier, 46, 67, 72.
 - as to connecting carriers, 46, 77.
 - storing goods held, 72.
 - goods shipped by one not the owner, 46, 72.
 - goods stopped *in transitu*, 78.

LIMITATION OF LIABILITY—

- see CONTRACTS, STATUTES.

LIVERYMAN—

- see AGISTERS.

LIVE-STOCK—

- see ANIMALS.

LOAN—

- see GRATUITOUS LOANS, MUTUUM.

LOCATIO OPERIS—

- classified, 1.
- defined, 1, 62.
- nature of relation, 1.
- rights and duties of the parties—
 - compensation, 18, 36.
 - secured by lien, 37.
 - who can give lien, 38, 39.
 - basis of lien, 37, 40-42.
 - not extended to agisters and liverymen, 40.
 - kinds of lien, 42.

[REFERENCES ARE TO SECTIONS.]

LOCATIO OPERIS—Continued.

- how regarded by the courts, 26, 42.
- their extent, 42, 43, 46.
- enforcement of lien, 44, 45.
- waver of lien, 37.
- termination of lien, 44.
- property rights of parties, 14, 41.
- ordinary care required, 1, 47.
- special *locatio custodias* bailments—
 - warehousemen, elevator owners, cold storage companies, 48.
 - usage and custom important, 48.
 - warehouse receipts, 24, 48, 49.
 - confusion of goods, 4, 48.
 - care required, 9, 43.
 - safe-deposit companies, 7.

LOCATIO REI—

- classified, 1.
- defined, 1.
- rights and duties of the parties—
 - bailor warrants title, 11.
 - expenses borne by whom, 11.
 - right to use, 11, 33, 34.
 - misuse may amount to conversion, 12, 33, 34.
 - trover for conversion, 12, 33-35.
- special property of hirer, 14, 47.
- termination of the relation, 17, 33.

MANDAMUS—

- against common carrier, 71-73, 80.
- against telephone companies, 176.

MANDATUM—

- classified, 1.
- see also GRATUITOUS SERVICES.

MISFEASANCE AND NONFEASANCE—

- liability of bailee for, 10.

MUTUAL BENEFIT BAILMENTS—

- see LOCATIO, PLEDGE.
- nature of relation in general—
 - recompense essential, 6, 7, 18.
- termination of the relation, 33.

MUTUUM—

- distinguished from bailment, 4.

NEGLIGENCE—

- see CARE.
- three degrees, 1, 6-8, 19, 103, 135, 159, 167.
- burden of proof in showing, 9, 43, 58, 59, 61, 79.
- of carrier when overtaken by Act of God, 89.
- cannot contract against, 66, 79, 103, 106, 167.
- special rules in certain States, 103, 104.

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—Continued.

burden of proof in showing, 79, 97.

see BURDEN OF PROOF.

of passenger carrier—

in providing safe means of conveyance, 135, 151, 153.

latent defects, 152.

as to roadbed and bridges, 153, 154.

as to station facilities, 131, 157, 158:

liable for slightest negligence, 100, 103, 131, 134-136, 152, 153, 155-158.

contributory negligence of passenger, 150, 158.

affected by contract, 100, 103, 133, 134.

of telegraph and telephone companies—

contracts against, 166-171.

companies liable for agents' negligence, 167, 170, 185.

actions for, 169, 170, 174, 185.

the damages, 168, 169, 174, 184-186.

NEGOTIABLE INSTRUMENTS—

see BILLS OF LADING, STOCKS AND BONDS.

how cared for by pledgee, 7.

not sold to satisfy pledge, 32.

NOTICES—

see COMMON CARRIERS OF GOODS, TELEGRAPH AND TELEPHONE COMPANIES.

OWNER—

in general, bailor is, 3.

bailee may not dispute title, 3.

custody of goods by guest, 52, 53, 61.

delivery to by carrier, 120.

custody of goods by passenger, 53, 54, 164.

may sue carrier, 76, 122, 177.

PARTIES—

see ACTIONS.

PARTNERSHIP—

among connecting carriers, 123, 124.

PASS—

see FARE.

PASSENGERS—

see CARRIERS OF PASSENGERS, ELEVATORS, STRAMDOATS, SLEEPING CAR COMPANIES.

PERSONAL PROPERTY—

subject of pledge, 22, 25.

PIGNUS—

see PLEDGE.

PLEADINGS—

see ACTIONS.

PLEDGE—

classified, 1.

[REFERENCES ARE TO SECTIONS.]

PLEDGE—Continued.

defined, 1, 21, 22.

nature of the relation—

distinguished from chattel mortgage and lien, 23-25.

subject matter, 22, 25.

incorporeal property, 22, 24, 25.

corporate stock, 25, 28.

delivery essential, 23, 24.

the obligation, 26.

rights and duties of the parties—

custody of pledgee, 22-24.

profits and expenses go with pledge, 16, 27, 28.

right to use, 1, 21.

assignment by pledgee, 23, 30.

corporate stock, 28.

power of pledgee to compel transfer on books of corporation, 25.

care, 1, 7.

proceeds of collateral how applied, 22, 26, 27.

conversion by misapplication, 25, 29.

measure of damages, 25, 29.

termination of the relation—

various ways, 21, 22, 31.

by full performance, 30.

by default of pledgor, 31.

remedies of pledgee, 21, 22, 23, 31.

suit on debt, 31.

sale at common law, 21, 22, 25, 31, 32.

of stocks, bonds, notes, 25, 32.

sale in equity, 21-23, 31.

sale under special contract, 31, 32.

equitable principles govern, 26, 30, 32, 44.

equity of redemption, 21, 25.

by consent of pledgee, 44.

by wrong of pledgee, 29, 30, 44.

redelivery by pledgee, 1, 16, 21, 23, 25-27.

POSSESSION—

passes in bailment, 2, 3.

in chattel mortgage, pledge and lien, 23-25, 40.

right of pledgee against all the world, 22.

essential to life of pledge, 16, 21, 23-27.

POSTOFFICE DEPARTMENT—

postmasters, mail contractors, etc., not common carriers, 116.

PRIVATE CARRIERS—

defined, 1, 62, 63, 103.

PROPERTY—

of bailor and bailee, 2, 3, 4, 13, 14, 16, 41, 122.

of borrower, 1, 3, 8, 14, 15.

[REFERENCES ARE TO SECTIONS.]

PROPERTY—Continued.

of pledgee, 1, 16, 23-25.

of pledgor, 22, 25, 26, 30.

of hirer and letter, 11, 14, 47.

of parties in *locatio operis* bailments, 41, 47, 79.

PROXIMATE CAUSE—

conversion of property as, 29.

Act of God as, 89.

delay as, 89.

of injuries to passenger, 141.

contributory negligence of passenger, 156.

of injuries to goods, 178, 179.

of injury to passengers, 159, 182.

of failure of telegraph company in transmission of message, 168, 169, 172, 174, 184-186.

PUBLIC AUTHORITY—

as excuse for carrier's failure to deliver, 90, 91, 92.

PUBLIC CARRIERS—

see **COMMON CARRIERS.**

PUBLIC EMPLOYMENT—

of carriers of goods, 62, 63, 65, 73, 79, 80, 85, 95, 100, 103, 112, 113.

of innkeepers, 50, 52.

of carriers of passengers, 103, 129, 136, 149-151.

of telegraph and telephone companies, 167, 170, 172, 173, 176, 185.

PUBLIC ENEMY—

defined, 1.

see **COMMON CARRIER.**

PUBLIC POLICY—

forbids discrimination in freight rates, 73, 74.

makes the innkeeper an insurer of guest's goods, 50, 54, 58-60.

makes common carriers insurers of goods carried, 62, 66, 68, 79-100, 103, 104, 112.

as to contracts by common carriers limiting their liability, 62, 103-105, 114.

must be reasonable and just, 103.

as to carriers of passengers, 103, 129, 134, 136.

affecting conditions printed on tickets, 144.

demands utmost care as to passengers, 103, 136.

sleeping car companies, 53, 54.

owners of passenger elevators, 160.

in the case of gratuitous carriers, 103, 133, 134.

QUASI-BAILEES—

see **CARRIERS OF PASSENGERS, POSTOFFICE DEPARTMENT, TELEGRAPH AND TELEPHONE COMPANIES.**

RAILROADS—

see **COMMON CARRIERS.**

not common carriers of express companies, 86.

[REFERENCES ARE TO SECTIONS.]

RAILROADS—Continued.

delivery by, where, 112-114.
as warehousemen, 72, 80, 108, 111-114.

REDELIVERY—

in general, 1, 2, 3, 16, 17, 113.
what, 2, 4, 16, 25.
where, 17, 113.
to whom, 3, 17.
by gratuitous bailee, 1, 15, 19.
by borrower, 1, 13, 15.
by pledgee, 16, 21, 23, 25-27.
by hirer, 33.

REDEMPTION OF PLEDGE—

see PLEDGE.

REGULATIONS—

see RULES AND REGULATIONS.

RESTAURANTS—

see BOARDING AND LODGING HOUSES.

RIGHTS AND DUTIES—

see the various classes of bailments.

ROADBED AND BRIDGES—

must be safe, 154, 158.

RULES AND REGULATIONS—

public notice of by carrier of goods, 79, 100, 114.
as to sale of tickets, 138, 140-142, 145.
by passenger carrier, 131, 138-140, 142, 144, 148, 149.
must be reasonable, 138, 141, 146, 149, 150, 151, 157, 162.
ejection of passengers for breach, 139, 140-142, 151.
by telegraph and telephone companies, 167, 168, 170, 172.

SAFE-DEPOSIT COMPANIES—

are bailees, 7.

SALE—

distinguished from bailment, 4.
of pledge upon default of pledgor, 21-23, 25, 26, 31, 32, 44.
under lien, 77.

SKILL—

see CARE.

SLEEPING CAR COMPANIES—

are not innkeepers, 53, 54.
nor common carriers of passengers, 53, 54, 65, 129.
nature of their undertaking, 54.

STATIONAL FACILITIES—

railroad must maintain, 131, 157, 158.

STATUTES—

extending lien, 77.
affecting liability of innkeeper, 61.
controlling compensation of carrier, 70, 71, 73.
as to negotiability of bills of lading, 49, 84.

[REFERENCES ARE TO SECTIONS.]

STATUTES—Continued.

regulating charges by telephone companies, 176.

giving action for injury causing death, 133, 181.

STEAMBOAT COMPANIES—

not innkeepers, 55.

STOCKS, BONDS, ETC.—

redelivery of, 25.

may be pledged, 25.

corporate stock, 25.

how pledged, 25, 28.

damages for conversion of, 25.

how sold to satisfy pledge, 32.

STOPPAGE IN TRANSITU—

goods subject to carrier's lien, 46, 78.

as excuse for non-delivery by carrier, 128.

TELEGRAPH AND TELEPHONE COMPANIES—

are quasi-bailees, 167-169, 185.

definition, 185.

exercise a public calling, 167-170.

are not common carriers, 167, 168, 171, 185.

rights and duties—

right to compensation, 169, 172.

must not discriminate, 173.

right to make rules and regulations, 167, 168, 172, 173.

notice of rules, 170.

what regulations reasonable, 168, 170, 172.

duty to serve all impartially, 167, 173, 185.

duty to provide adequate facilities, 172, 173.

liability for mistakes in transmitting message, 167, 170, 171, 185.

contracts limiting liability, 167-171, 174, 185.

liability for delay or failure to deliver, 167, 174.

termination of the relation—

delivery of message, 175.

actions against—

the parties, 170, 174.

contract by sender or his principal, 169, 170, 174, 185.

tort on common law duty, 170.

the evidence, 167, 169, 174.

the damages, 168, 169, 174, 184-186.

TELEPHONE—

see TELEGRAPH AND TELEPHONE COMPANIES.

like telegraph, 176.

not common carriers, 176.

duty to serve all impartially, 176.

statutes regulating charges, 176.

TERMINATION OF RELATION—

see the various classes of bailments.

[REFERENCES ARE TO SECTIONS.]

TICKETS—

- as contracts limiting carrier's liability, 102, 134, 143.
- required of those desiring to become passengers, 138, 139.
- as evidence of right to ride, and may contain contract, 146.
- sale of, 140-142.
- nature of, 102, 138, 144.
 - as contract with passenger, 102, 125, 141, 143, 144.
 - as between passenger and conductor, 141, 145, 146.
 - conditions printed on, 134, 143, 144.
 - stop-overs, coupon and limited tickets, 102, 144, 147, 148, 151.

TIME-TABLES—

- carriers should conform to, 161.

TITLE—

- see PROPERTY.
- does not pass in bailment, 2, 3, 4.
- of bailor, bailee may not dispute, 3.
- of pledgee, 1, 23-25.
- of assignee of pledgee, 28.
- letter warrants, 11.
- of bailee for hired services, 41, 47.

TRANSIENTS—

- kept at inn, 52.
- defined, 50, 52, 53, 56.
- how become guests, 57, 58.

TROVER—

- see CONVERSION.
- for failure to restore chattel, 19.
- against pledgee, 21.
- for wrongful sale of property, 44, 77.

USAGE—

- see CUSTOM.

USE—

- right to by bailee, 6, 7, 12, 15, 19, 24.
 - by pledgee, 1, 21.
 - by hirer, 33.

VALUE—

- duty of shipper to reveal, 92, 93, 100.
- public notice to reveal, 62, 93, 100, 105.
- fixed by contract, 105, 106.
- duty of passenger to reveal as to baggage, 54, 93, 100, 163.
- duty to disclose importance of telegraph message, 167, 168, 184.

VEHICLES—

- of passenger carrier must be safe, 151-153.
- defects in, raise presumption of negligence, 153.

WAREHOUSEMAN—

- are custodians for hire, 43.
- usage and custom of importance, 43.

[REFERENCES ARE TO SECTIONS.]

WAREHOUSEMAN—Continued.

nature of warehouse receipts, 24, 49.

confusion of goods, 48.

care required, 9, 43.

warehouseman's lien, 42, 43.

storing goods held on lien, 72.

railroad companies as, 72, 80, 112, 113.

connecting carriers are not, 81, 126.

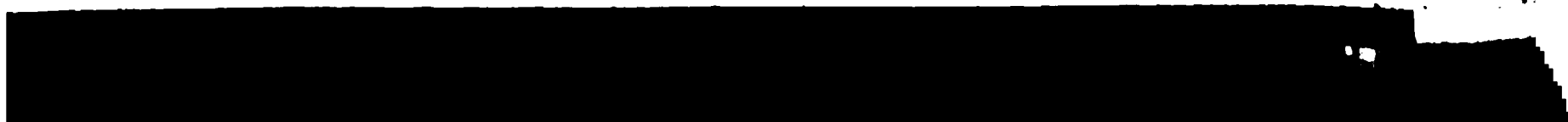
delivery to by a carrier, 108, 111-114.

WAREHOUSE RECEIPTS—

see **BILLS OF LADING, WAREHOUSEMAN.**

WARRANTY—

see **TITLE.**



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